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1

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8

9

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11

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17

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26

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28

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34

35

36

37

38





THE
AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

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AMERICAN STATE REPORTS.

VOL. LXXVII

SCHEDULE

showing the original volumes of reports in which the cases herein selected and re-reported may be found, and the pages of this volume devoted to each state.

	PAGE.
ALABAMA REPORTS	Vol. 121. 17-77
ARKANSAS REPORTS	Vol. 67. 78-140
CALIFORNIA REPORTS	Vol. 126. 141-221
COLORADO REPORTS	Vol. 26. 222-300
CONNECTICUT REPORTS	Vol. 72. 301-349
GEORGIA REPORTS	Vol. 109. 350-410
INDIANA APPEALS	Vol. 23. 411-445
INDIANA REPORTS	Vol. 154. 446-515
IOWA REPORTS	Vol. 109. 516-564
MICHIGAN REPORTS	Vol. 120. 565-606
MINNESOTA REPORTS	Vols. 76, 77. 607-700
MISSOURI REPORTS	Vols. 153, 154. 701-785
NEVADA REPORTS	Vol. 24. 786-823
TEXAS REPORTS	Vol. 93. 824-901
UTAH REPORTS	Vol. 20. 902-985

SCHEDULE

SHOWING IN WHAT VOLUMES OF THIS SERIES THE CASES
REPORTED IN THE SEVERAL VOLUMES OF OFFICIAL
REPORTS MAY BE FOUND.

State reports are in parentheses, and the numbers of this series in bold-faced figures.

ALABAMA.—(83) **3**; (84) **5**; (85) **7**; (86) **11**; (87) **13**; (88) **16**; (89) **18**; (90, 91) **24**; (92) **25**; (93) **30**; (94) **33**; (95) **36**; (96, 97) **38**; (98) **39**; (99) **42**; (100, 101) **46**; (102) **48**; (103) **49**; (104, 105) **53**; (106, 107, 108) **54**; (109, 110) **55**; (111) **56**; (112) **57**; (113) **59**; (114) **62**; (115, 116) **67**; (118, 119) **72**; (120) **74**; (121) **77**.

ARKANSAS.—(48) **3**; (49) **4**; (50) **7**; (51) **14**; (52) **20**; (53) **22**; (54) **26**; (55) **29**; (56) **35**; (57) **38**; (58) **41**; (59) **43**; (60) **46**; (61, 62) **54**; (63) **58**; (64) **62**; (65) **67**; (66) **74**; (67) **77**.

CALIFORNIA.—(72) **1**; (73) **2**; (74) **5**; (75) **7**; (76) **9**; (77) **11**; (78, 79) **12**; (80) **13**; (81) **15**; (82) **16**; (83) **17**; (84) **18**; (85) **20**; (86) **21**; (87, 88) **22**; (89) **23**; (90, 91) **25**; (92, 93) **27**; (94) **28**; (95) **29**; (96) **31**; (97) **33**; (98) **35**; (99) **37**; (100) **38**; (101) **40**; (102) **41**; (103) **42**; (104) **43**; (105) **45**; (106) **46**; (107) **48**; (108) **49**; (109) **50**; (110, 111) **52**; (112) **53**; (113) **54**; (114) **55**; (115) **56**; (116) **58**; (117) **59**; (118) **62**; (119) **63**; (120) **65**; (121) **66**; (122) **68**; (123) **69**; (124) **71**; (125) **73**; (126) **77**.

COLORADO.—(10) **3**; (11) **7**; (12) **13**; (13) **16**; (14) **20**; (15) **22**; (16) **25**; (17) **31**; (18) **36**; (19) **41**; (20) **46**; (21) **52**; (22) **55**; (23) **58**; (24) **65**; (25) **71**; (26) **77**.

CONNECTICUT.—(54) **1**; (55) **3**; (56) **7**; (57) **14**; (58) **18**; (59) **21**; (60) **25**; (61) **29**; (62) **36**; (63) **38**; (64) **42**; (65) **48**; (66) **50**; (67) **52**; (68) **57**; (69) **61**; (70) **66**; (71) **71**; (72) **77**.

DELAWARE.—(5 Houst.) **1**; (6 Houst.) **22**; (7 Houst.) **40**; (9 Houst.) **43**; (1 Marv.) **65**; (2 Marv.) **69**; (1 Pennewill) **73**.

FLORIDA.—(22) **1**; (23) **11**; (24) **12**; (25, 26) **23**; (27) **26**; (28) **29**; (29) **30**; (30) **32**; (31) **34**; (32) **37**; (33) **39**; (34) **43**; (35) **48**; (36) **51**; (37) **53**; (38) **56**; (39) **63**; (40) **74**.

GEORGIA.—(76) **2**; (77) **4**; (78) **6**; (79) **11**; (80, 81) **12**; (82) **14**; (83, 84) **20**; (85) **21**; (86) **22**; (87) **27**; (88) **30**; (89) **32**; (90) **35**; (91, 92, 93) **44**; (94) **47**; (95, 96) **51**; (97) **54**; (98) **58**; (99) **59**; (100) **62**; (101) **65**; (102) **66**; (103) **68**; (104) **69**; (105) **70**; (106) **71**; (107) **73**; (108) **75**; (109) **77**.

IDAHO.—(2) **35**.

ILLINOIS.—(121) 2; (122) 3; (123) 5; (124) 7; (125) 8; (126) 9; (127) 11; (128) 15; (129) 16; (130) 17; (131) 19; (132) 22; (133, 134) 23; (135) 25; (136) 29; (137) 31; (138, 139) 32; (140, 141) 33; (142) 34; (143, 144, 145) 36; (146, 147) 37; (148) 39; (149, 150) 41; (151) 42; (152) 43; (154) 45; (153, 155) 46; (156) 47; (157) 48; (158) 49; (159) 50; (160, 161) 52; (162) 53; (163) 54; (164, 165) 56; (166) 57; (167) 59; (168, 169) 61; (170) 62; (171) 63; (172, 173) 64; (174) 66; (175) 67; (176) 68; (177, 178) 69; (179) 70; (180, 181) 72; (182) 74; (183, 184) 75; (185) 76.

INDIANA.—(112) 2; (113) 3; (114) 5; (115) 7; (116) 9; (117, 118) 10; (119) 12; (120, 121) 16; (122) 17; (123) 18; (124) 19; (125) 21; (126, 127) 22; (128) 25; (129) 28; (130) 30; (131) 31; (132) 32; (133) 36; (134) 39; (135) 41; (136) 43; (137) 45; (138) 46; (139) 47; (140) 49; (1, 2, 3 Ind. App.; 141) 50; (4, 5, 6 Ind. App.; 142) 51; (7, 8 Ind. App.; 143) 52; (9, 10 Ind. App.) 53; (11 Ind. App.) 54; (13 Ind. App.; 144) 55; (14 Ind. App.) 56; (15 Ind. App.; 145) 57; (146) 58; (16 Ind. App.) 59; (17 Ind. App.) 60; (147, 148) 62; (18 Ind. App.; 149) 63; (150; 19 Ind. App.) 65; (20 Ind. App.) 67; (151) 68; (21 Ind. App.) 69; (152) 71; (22 Ind. App.) 72; (153) 74; (23 Ind. App.; 154) 77.

IOWA.—(72) 2; (73) 5; (74) 7; (75) 9; (76, 77) 14; (78) 16; (79) 18; (80) 20; (81) 25; (82) 31; (83) 32; (84) 35; (85) 39; (86) 41; (87) 43; (88) 45; (89, 90), 48; (91) 51; (92) 54; (93) 57; (94, 95) 58; (96, 97) 59; (98) 60; (99) 61; (100) 62; (101, 102) 63; (103) 64; (104) 65; (105) 67; (106) 68; (107) 70; (108) 75; (109) 77.

KANSAS.—(37) 1; (38) 5; (39) 7; (40) 10; (41) 13; (42) 16; (43) 19; (44) 21; (45) 23; (46) 26; (47) 27; (48) 30; (49) 33; (50) 34; (51) 37; (52) 39; (53) 42; (54) 45; (55) 49; (56) 54; (57) 57; (58) 62; (59) 68; (60) 72.

KENTUCKY.—(83, 84) 4; (85) 7; (86) 9; (87) 12; (88) 21; (89) 25; (90) 29; (91) 34; (92) 36; (93) 40; (94) 42; (95) 44; (96) 49; (97) 53; (98) 56; (99) 59; (100) 66; (101) 72.

LOUISIANA.—(39 La. Ann.) 4; (40 La. Ann.) 8; (41 La. Ann.) 17; (42 La. Ann.) 21; (43 La. Ann.) 26; (44 La. Ann.) 32; (45 La. Ann.) 40; (46, 47 La. Ann.) 49; (48 La. Ann.) 55; (49 La. Ann.) 62; (50 La. Ann.) 69; (51 La. Ann.) 72.

MAINE.—(79) 1; (80) 6; (81) 10; (82) 17; (83) 23; (84) 30; (85) 35; (86) 41; (87) 47; (88) 51; (89) 56; (90) 60; (91) 64; (92) 69; (93) 74.

MARYLAND.—(67) 1; (68) 6; (69) 9; (70) 14; (71) 17; (72) 20; (73) 25; (74) 28; (75) 32; (76) 35; (77) 39; (78) 44; (80) 45; (79) 47; (81) 48; (82) 51; (83) 55; (84) 57; (85) 60; (86) 63; (87) 67; (88) 71; (89) 73.

MASSACHUSETTS.—(145) 1; (146) 4; (147) 9; (148) 12; (149) 14; (150) 15; (151) 21; (152) 23; (153) 25; (154) 26; (155) 31; (156) 32; (157) 34; (158) 35; (159) 38; (160) 39; (161) 42; (162) 44; (163) 47; (164) 49; (165) 52; (166) 55; (167) 57; (168) 60; (169) 61; (170) 64; (171) 68; (172) 70; (173) 73; (174) 75.

MICHIGAN.—(60, 61) 1; (62) 4; (63) 6; (64, 65) 8; (66, 67) 11; (68, 69, 75) 13; (70) 14; (71, 76) 15; (72, 73, 74) 16; (77, 78) 18; (79) 19; (80) 20; (81, 82, 83) 21; (84) 22; (85, 86, 87) 24; (88) 26; (89) 28; (90, 91) 30; (92) 31; (93) 32; (94) 34; (95, 96) 35; (97) 37; (98) 39; (99) 41; (100) 43;

(101) 45; (102) 47; (103) 50; (104) 53; (105) 55; (106) 58; (107) 61;
(108) 62; (109) 63; (110) 64; (111) 66; (112, 113) 67; (114) 68; (115)
69; (116, 117) 72; (118) 74; (119) 75; (120) 77.

MINNESOTA. — (36) 1; (37) 5; (38) 8; (39, 40) 12; (41) 16; (42) 18; (43) 19;
(44) 20; (45) 22; (46) 24; (47) 28; (48) 31; (49) 32; (50) 36; (51, 52)
38; (53) 39; (54) 40; (55) 43; (56) 45; (57) 47; (58) 49; (59) 50; (60) 51;
(61) 52; (62) 54; (63) 56; (64) 58; (65) 60; (66) 61; (67, 68) 64; (69)
65; (70) 68; (71) 70; (72) 71; (73) 72; (74) 73; (75) 74; (76, 77) 77.

MISSISSIPPI. — (65) 7; (66) 14; (67) 19; (68) 24; (69) 30; (70) 35; (71) 42;
(72) 48; (73) 55; (74) 60; (75) 65; (76) 71.

MISSOURI. — (92) 1; (93) 3; (94) 4; (95) 6; (96) 9; (97) 10; (98) 14; (99) 17;
(100) 18; (101) 20; (102) 22; (103) 23; (104, 105) 24; (106) 27; (107) 28;
(108, 109) 32; (110, 111) 33; (112) 34; (113, 114) 35; (115) 37; (116, 117)
38; (118) 40; (119, 120) 41; (121) 42; (122) 43; (123) 45; (124, 125) 46;
(126) 47; (127) 48; (128) 49; (129) 50; (130) 51; (131) 52; (132) 53;
(133) 54; (134) 56; (135, 136) 58; (137) 59; (138) 60; (139) 61; (140)
62; (141, 142) 64; (143) 65; (144) 66; (145) 68; (146) 69; (147, 148) 71;
(149, 150) 73; (151) 74; (152) 75; (153, 154) 77.

MONTANA. — (9) 18; (10) 24; (11) 28; (12) 33; (13) 40; (14) 43; (15) 48;
(16) 50; (17) 52; (18) 56; (19) 61; (20) 63; (21) 69; (22) 74; (23) 75.

NEBRASKA. — (22) 3; (23, 24) 8; (25) 13; (26) 18; (27) 20; (28, 29) 26; (30)
27; (31) 28; (32, 33) 29; (34) 33; (35) 37; (36) 38; (37) 40; (38) 41;
(39, 40) 42; (41) 43; (42, 43) 47; (44) 48; (45, 46) 50; (47) 53; (47, 48)
53; (49) 59; (50) 61; (51, 52) 66; (53) 68; (54) 69; (55) 70; (56) 71;
(57) 73; (58) 76.

NEVADA. — (19) 3; (20) 19; (21) 37; (22) 58; (23) 62; (24) 77.

NEW HAMPSHIRE. — (64) 10; (62) 13; (65) 23; (66) 49; (67) 68; (68) 73;
(69) 76.

NEW JERSEY. — (43 N. J. Eq.) 3; (44 N. J. Eq.) 6; (50 N. J. L.) 7; (51
N. J. L.; 45 N. J. Eq.) 14; (46 N. J. Eq.; 52 N. J. L.) 19; (47 N. J.
Eq.) 24; (53 N. J. L.) 26; (48 N. J. Eq.) 27; (49 N. J. Eq.) 31; (54
N. J. L.) 33; (50 N. J. Eq.) 35; (55 N. J. L.) 39; (51 N. J. Eq.) 40; (56
N. J. L.) 44; (52 N. J. Eq.) 46; (57 N. J. L.; 53 N. J. Eq.) 51; (54 N. J.
Eq.; 58 N. J. L.) 55; (59 N. J. L.) 59; (55 N. J. Eq.) 62; (60 N. J. L.)
64; (56 N. J. Eq.) 67; (61 N. J. L.) 68; (62 N. J. L.) 72; (57 N. J. Eq.)
73; (63 N. J. L.) 76.

NEW YORK. — (107) 1; (108) 2; (109) 4; (110) 6; (111) 7; (112) 8; (113) 10;
(114) 11; (115) 12; (116, 117) 15; (118, 119) 16; (120) 17; (121) 18; (122)
19; (123) 20; (124, 125) 21; (126) 22; (127) 24; (128, 129) 26; (130,
131) 27; (132, 133) 28; (134) 30; (135) 31; (136) 32; (137) 33; (138) 34;
(139) 36; (140) 37; (141) 38; (142) 40; (143) 42; (144) 43; (145) 45;
(146) 49; (147) 49; (148) 51; (149) 52; (150) 55; (151) 56; (152) 57;
(153) 60; (154) 61; (155) 63; (156) 66; (157) 68; (158, 159) 70; (160)
73; (161, 162) 76.

NORTH CAROLINA. — (97, 98) 2; (99, 100) 6; (101) 9; (102) 11; (103) 14; (104)
17; (105) 18; (106) 19; (107) 22; (108) 23; (109) 26; (110) 28; (111) 32;
(112) 34; (113) 37; (114) 41; (115) 44; (116) 47; (117) 53; (118) 54;
(119) 56; (120) 58; (121) 61; (122) 65; (123) 68; (124) 70; (125) 74.

NORTH DAKOTA.—(1) 26; (2) 33; (3) 44; (4) 50; (5) 57; (6, 7) 66; (8) 73.

OHIO.—(45 Ohio St.) 4; (46 Ohio St.) 15; (47 Ohio St.) 21; (48 Ohio St.) 29;
(49 Ohio St.) 34; (50 Ohio St.) 40; (51 Ohio St.) 46; (52 Ohio St.) 49;
(53 Ohio St.) 53; (54 Ohio St.) 56; (55, 56 Ohio St.) 60; (57 Ohio St.) 63;
(58 Ohio St.) 65; (59 Ohio St.) 69; (60 Ohio St.) 71; (61 Ohio St.) 76.

OREGON.—(15) 3; (16) 8; (17) 11; (18) 17; (19) 20; (20) 23; (21) 28; (22)
29; (23) 37; (24) 41; (25) 42; (26) 46; (27) 50; (28) 52; (29) 54; (30)
60; (31) 65; (32) 67; (33) 72; (34) 75; (35) 76.

PENNSYLVANIA.—(115, 116, 117 Pa. St.) 2; (118, 119 Pa. St.) 4; (120, 121
Pa. St.) 6; (122 Pa. St.) 9; (123, 124 Pa. St.) 10; (125 Pa. St.) 11; (126
Pa. St.) 12; (127 Pa. St.) 14; (128, 129 Pa. St.) 15; (130, 131 Pa. St.) 17;
(132, 133, 134 Pa. St.) 19; (135, 136 Pa. St.) 20; (137, 138 Pa. St.) 21;
(139, 140, 141 Pa. St.) 23; (142, 143 Pa. St.) 24; (144, 145 Pa. St.) 27;
(146 Pa. St.) 28; (147, 150 Pa. St.) 30; (151 Pa. St.) 31; (148 Pa. St.)
33; (149, 152, 153 Pa. St.) 34; (154, 155 Pa. St.) 35; (156 Pa. St.) 36;
(157 Pa. St.) 37; (158 Pa. St.) 38; (159 Pa. St.) 39; (160 Pa. St.) 40;
(161 Pa. St.) 41; (162 Pa. St.) 42; (163 Pa. St.) 43; (164, 165 Pa. St.) 44;
(166 Pa. St.) 45; (167 Pa. St.) 46; (168, 169 Pa. St.) 47; (170, 171 Pa.
St.) 50; (172, 173 Pa. St.) 51; (174, 175 Pa. St.) 52; (176 Pa. St.) 53;
(177 Pa. St.) 55; (178 Pa. St.) 56; (179, 180 Pa. St.) 57; (181 Pa. St.)
59; (182 Pa. St.) 61; (183, 184 Pa. St.) 63; (185 Pa. St.) 64; (186 Pa.
St.) 65; (187 Pa. St.) 67; (188 Pa. St.) 68; (189 Pa. St.) 69; (190 Pa.
St.) 70; (191 Pa. St.) 71; (192 Pa. St.) 73; (193 Pa. St.) 74; (194 Pa.
St.) 75.

RHODE ISLAND.—(15) 2; (16) 27; (17) 33; (18) 49; (19) 61.

SOUTH CAROLINA.—(26) 4; (27, 28, 29) 13; (30) 14; (31, 32) 17; (33) 26;
(34) 27; (35) 28; (36) 31; (37) 34; (38) 37; (39) 39; (40) 42; (41) 44;
(42) 46; (43) 49; (44) 51; (45) 55; (46) 57; (47) 58; (48) 59; (49) 61;
(50) 62; (51) 64; (52) 68; (53) 69; (54) 71; (55) 74; (56, 57) 76.

SOUTH DAKOTA.—(1) 26; (2) 39; (3) 44; (4) 46; (5) 49; (6) 55; (7) 58;
(8) 59; (9) 62; (10) 66; (11) 74; (12) 76.

TENNESSEE.—(85) 4; (86) 6; (87) 10; (88) 17; (89) 24; (90) 25; (91) 30;
(92) 36; (93) 42; (94) 45; (95) 49; (96) 54; (97) 56; (98) 60; (99) 63;
(100) 66; (101) 70; (102) 73; (103) 76.

TEXAS.—(68) 2; (69; 24 Tex. App.) 5; (70; 25, 26 Tex. App.) 8; (71) 10;
(27 Tex. App.) 11; (72) 13; (73, 74) 15; (75) 16; (76) 18; (77; 28 Tex.
App.) 19; (78) 22; (79) 23; (29 Tex. App.) 25; (80, 81) 26; (82) 27;
(30 Tex. App.) 28; (83) 29; (84) 31; (85) 34; (31 Tex. Cr. Rep.) 36; 37;
(86; 32 Tex. Cr. Rep.) 40; (87; 33 Tex. Cr. Rep.) 47; (34 Tex. Cr.
Rep.) 53; (89, 90) 59; (35 Tex. Cr. Rep.) 60; (36 Tex. Cr. Rep.) 61;
(91; 37 Tex. Cr. Rep.) 66; (38 Tex. Cr. Rep.) 70; (92) 71; (39 Tex. Cr.
Rep.) 73; (40 Tex. Cr. Rep.) 76; (93) 77.

UTAH.—(13) 57; (14) 60; (15) 62; (16) 67; (17) 70; (18) 72; (19) 75; (20)
77.

VERMONT.—(60) 6; (61) 15; (62) 22; (63) 25; (64) 33; (65) 36; (66) 44;
(67) 48; (68) 54; (69) 60; (70) 67; (71) 76.

VIRGINIA.—(82) 3; (83) 5; (84) 10; (85) 17; (86) 19; (87) 24; (88) 29; (89)
37; (90) 44; (91) 50; (92) 53; (93) 57; (94, 95) 64; (96) 70; (97) 75.

WASHINGTON. — (1) 22; (2) 26; (3) 28; (4) 31; (5) 34; (6) 36; (7) 38; (8) 40; (9) 43; (10) 45; (11) 48; (12) 50; (13) 52; (14) 53; (15) 55; (16) 58; (17) 61; (18) 63; (19) 67; (20) 72; (21) 75.

WEST VIRGINIA. — (29) 6; (30) 8; (31) 13; (32, 33) 25; (34) 26; (35) 29; (36) 32; (37) 38; (38, 39) 45; (40) 52; (41) 56; (42) 57; (43) 64; (44) 67; (45) 72; (46) 76.

WISCONSIN. — (69) 2; (70, 71) 5; (72) 7; (73) 9; (74, 75) 17; (76, 77) 20; (78) 23; (79) 24; (80) 27; (81) 29; (82) 33; (83) 35; (84) 36; (85, 86) 39; (87) 41; (88) 43; (89) 46; (90) 48; (91) 51; (92) 53; (93) 57; (94) 59; (95) 60; (96, 97) 65; (98, 99) 67; (100) 69; (101) 70; (102) 72; (103) 74; (104, 105) 76.

WYOMING. — (3) 31; (4) 62; (5) 63; (6) 71; (7) 75.

AMERICAN STATE REPORTS.

VOL. LXXVII.

CASES REPORTED.

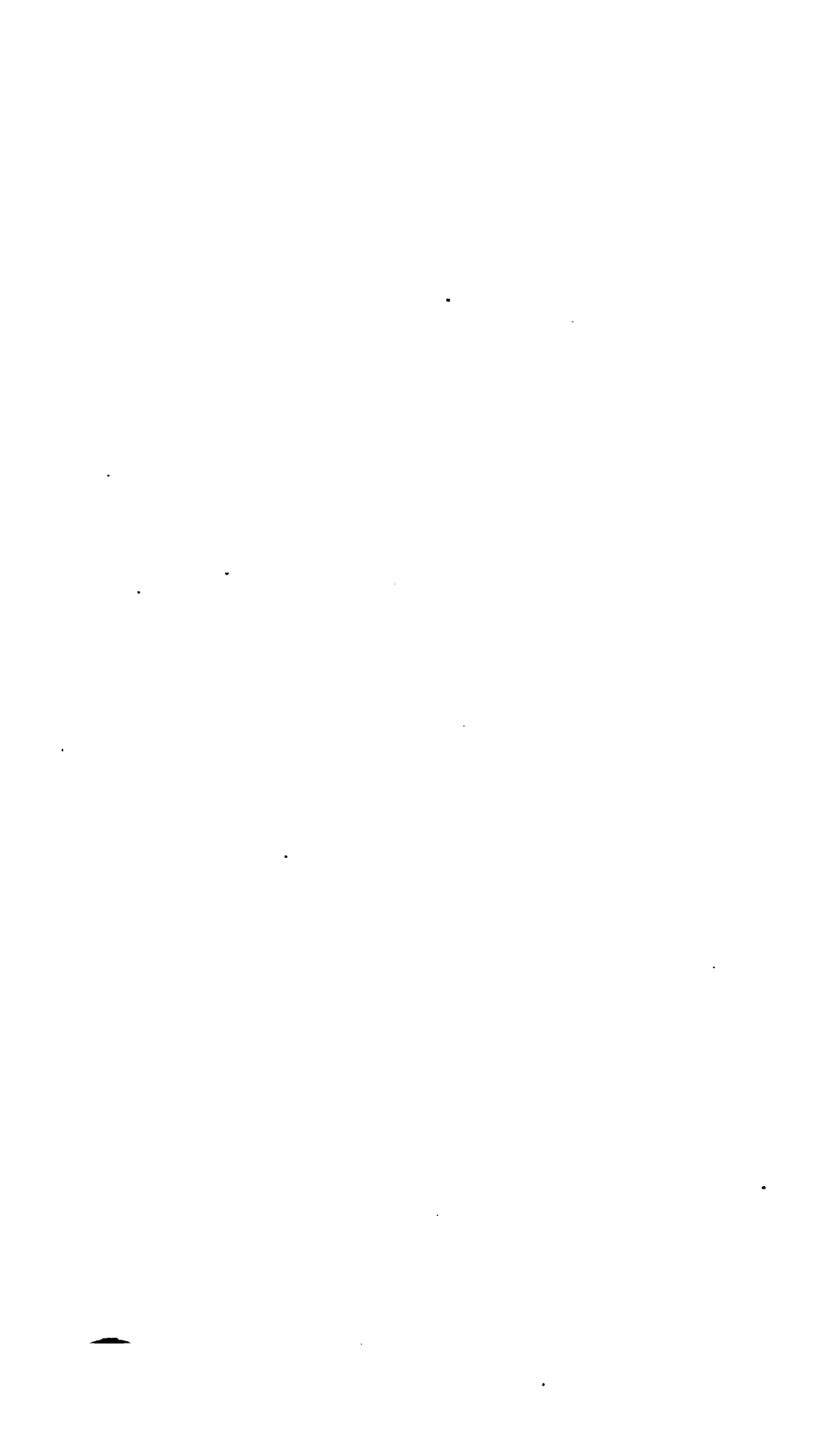
NAME.	SUBJECT.	REPORT.	PAGE.
Adams v. Baker	<i>Homestead</i>	24 Nev. 162	799
Adams v. Shelbyville	<i>Street Assessment</i>	154 Ind. 467	484
Ætna Life Ins. Co. v. Sellers	<i>Lunatic's Contract</i>	154 Ind. 370	481
Ahlens v. Thomas	<i>Judgm'ts—Privily</i> ..	24 Nev. 407	820
Alabama Midland Ry. Co. v. McGill	<i>Railroads</i>	121 Ala. 230	52
Alabama Mineral Land Co. v. Jackson			
	<i>Statute of Frauds</i> ..	121 Ala. 172	46
Anderson v. Cowles	<i>Search Warrant</i>	72 Conn. 335	310
Anderson v. Sessions	<i>Homestead</i>	93 Tex. 279	873
Arkansas Fire Ins. Co. v. Wilson ..	<i>Fire Insurance</i>	67 Ark. 553	129
Bagley v. Pennington	<i>Homestead</i>	76 Minn. 226	637
Baker v. Cauthorn	<i>Attorneys' Fees</i>	23 Ind. App. 611	443
Barnes v. Western Union Tel. Co. ..	<i>Delay of Message</i> ..	24 Nev. 125	791
Barnett v. Squyres	<i>Execution Sale</i>	93 Tex. 193	854
Bates v. St. Louis	<i>Officer's Salary</i>	153 Mo. 18	701
Bathgate v. Irvine	<i>Diversion of Waters</i> ..	126 Cal. 135	158
Bessemer Land etc. Co. v. Campbell	<i>Negligence</i>	121 Ala. 50	17
Birch v. Anthony			
Birmingham Water Works Co. v. Hume	<i>Husband and Wife</i> ..	109 Ga. 349	379
Blair v. Ostrander	<i>Federal Judgments</i> ..	109 Iowa, 204	532
Bollinger v. Wilson	<i>Sale of Liquors</i>	76 Minn. 262	646
Bowen v. Port Huron etc. Co.	<i>Garnishment</i>	109 Iowa, 255	539
Brewer v. Atkeison	<i>Mortgages</i>	121 Ala. 410	64
Broadbuss v. Smith	<i>Pictures</i>	121 Ala. 335	61
Broyles v. Cox	<i>Homestead</i>	153 Mo. 242	714
Brush Electric etc. Co. v. Lefevre ..	<i>Electric Wires</i>	93 Tex. 604	898
Bullock v. Sprowls	<i>Infants</i>	93 Tex. 188	849
Capital Fire Ins. Co. v. Watson	<i>Bond of Agent</i>	76 Minn. 387	657
Central of Georgia Ry. Co. v. Brinson	<i>Garnishment</i>	109 Ga. 354	382

NAME.	SUBJECT.	REPORT.	PAGE
Christian & Craft eto. Co. v. Michael.....	{ <i>Mortgages</i>	121 Ala. 84.....	30
Conley v. Redwine.....			
Coughlin v. McElroy.....	<i>Execution Sales</i>	109 Ga. 640.....	398
County of Los Angeles v. Spencer.....	<i>Election Ballots</i>	72 Conn. 99.....	301
Cramer v. Hurt.....	<i>Nuisance</i>	126 Cal. 670.....	217
Darrow v. Summerhill.....	<i>Witnesses</i>	154 Mo. 112.....	752
Davenport v. Boyd.....	<i>Subrogation</i>	93 Tex. 92.....	833
Doeg v. Cook.....	<i>Mun. Corporations</i>	109 Iowa, 248.....	536
Doater v. Maniates Nat. Bank.....	<i>Mun. Corporations</i>	126 Cal. 213.....	171
Dunham v. Hartman.....	<i>Fraud. Conveyance</i> ..	67 Ark. 325	116
Dupree v. Salt Lake Valley eto. Co.	<i>Auction</i>	153 Mo. 625.....	741
Earl v. Chicago eto. Ry. Co.....	{ <i>Partial Foreclosure</i> ..	20 Utah, 103....	902
Ex parte Clarke.....			
Farmington eto. Co. v. Rhymney eto. Co.....	<i>Trespassers</i>	109 Iowa, 14.....	516
Fenton v. Edwards	<i>Producing Papers</i> ..	126 Cal. 235.....	176
Foster v. Row.....	{ <i>Mining Claim</i>	20 Utah, 363.....	913
Frost v. Thomas.....			
Furenes v. Eide	<i>Assignment for Creditors</i> }	126 Cal. 43	141
Galveston eto. Ry. Co. v. Zantinger.....	<i>Stockholders' Liability</i> }	120 Mich. 1.....	565
George v. Los Angeles Ry. Co....	<i>Injunction</i>	26 Colo. 222.....	259
Grattis v. Kansas City eto. R. R. Co.....	<i>Delivery of Deed</i> ...	109 Iowa, 511.....	545
Gulf eto. Ry. Co. v. Hayter.....	{ <i>Master and Servant</i> ..	93 Tex. 64	829
Hanover Fire Ins. Co. v. Crawford.....			
Hanson v. Ingwaldson.....	<i>Negligence—Children</i> }	126 Cal. 357.....	184
Harris v. Western Union Tel. Co.....	<i>Fellow-servants</i>	153 Mo. 380.....	721
Hart v. Church.....	<i>Damages for Freight</i> ..	93 Tex. 239.....	856
Hays v. Plummer.....	<i>Fire Insurance</i>	121 Ala. 258.....	55
Henderson v. Heyward.....	<i>Partition</i>	77 Minn. 533.....	692
Higgins v. Manson.....	<i>Telegraph Co's</i>	121 Ala. 519.....	70
Higgins v. Russo	{ <i>Homestead—Mortgage</i> }	126 Cal. 471.....	195
Hilpire v. Claude			
Hoerr v. Meihofor	<i>Neg. Instruments</i> ...	126 Cal. 107.....	153
Holmes v. Common Council.....	<i>Intoxicating Liquors</i>	109 Ga. 373.....	384
Hull v. Chapel.....	<i>Mortgages</i>	126 Cal. 467.....	192
In re Morgan.....	<i>Wrongful Attachm't</i> ..	72 Conn. 238....	307
In re Popejoy.....	<i>Adoption</i>	109 Iowa, 159....	524
Jossey v. Rushin.....	<i>Execution</i>	77 Minn. 228....	674
Judd v. Hartford	<i>Public Contract</i>	120 Mich. 226....	587
	<i>Release of Surety</i> ...	77 Minn. 159....	666
	<i>Eight-hour Law</i>	26 Colo. 415.....	269
	<i>Husband and Wife</i> ..	26 Colo. 32.....	222
	<i>Indorsement</i>	109 Ga. 319.....	377
	<i>Mun. Corporations</i> ..	72 Conn. 350....	312

NAME.	SUBJECT.	REPORT.	PAGE.
Kansas City etc. R. R. Co. v. Becker	Railroads— Fellow-servants	67 Ark. 1.....	78
Lamar Canal Co. v. Amity Land etc. Co.....	Title of Statute	26 Colo. 370....	261
Lapenta v. Lottieri	Partnership.....	72 Conn. 377....	315
Lidgerding v. Zignego.....	Easements	77 Minn. 421....	677
Long v. Elberton	Mun. Corporations..	109 Ga. 28.....	363
Mackenzie v. Hodgkin.....	Factors	126 Cal. 591.....	209
Mann v. O'Sullivan	Fellow-servants	126 Cal. 61.....	149
McBreen v. McBreen.....	Husband and Wife..	154 Mo. 323.....	758
McElveen v. Southern Ry. Co....	Bills of Lading....	109 Ga. 249.....	371
McKelvey v. Creevey.....	Pictures.....	72 Conn. 464....	321
McLain v. Howald.....	Wills—Children....	120 Mich. 274....	597
McLaughlin v. Kimball.....	Stockholders' Liability	20 Utah, 254....	908
Minneapolis etc. Co. v. Metropolitan Bank.....	Collecting Bank	76 Minn. 136....	609
Moore v. Allen.....	Antenuptial Agreement	26 Colo. 197....	255
Moore v. Hinshaw.....	Altering Instrument	23 Ind. App. 267.	434
Morris v. Fletcher	Husband and Wife..	67 Ark. 105.....	87
Morrison v. Clark.....	Mechanic's Lien....	20 Utah, 432....	924
Mt. Rosa Min. etc. Co. v. Palmer..	Mines and Mining..	26 Colo. 56.....	245
Nelden v. Clark.....	Repeal of Statute....	20 Utah, 382....	917
Nesbitt v. Delamar's etc. Min. Co.	Mining Claims.....	24 Nev. 273.....	807
Northern v. Hanners.....	Costs	121 Ala. 587....	74
Northwestern etc. Assn. v. Boardurtha.....	Insurance— Use of Liquor	23 Ind. App. 121.	414
Park v. Cross	Payment to Agent...	76 Minn. 167....	630
Peirce v. Chism	Receivers	23 Ind. App. 505.	441
Peterson v. Vanderburgh.....	Executors	77 Minn. 218....	671
Planters' Mutual Ins. Co. v. Loyd	Insurance— Forfeiture	67 Ark. 584.....	136
Platt v. Waterbury.....	Pollution of Waters.	72 Conn. 531....	335
Purell v. Chicago etc. Ry. Co....	Trespassers.....	109 Iowa, 629...	557
Reid v. Englehart-Davidson etc. Co.	Homestead	128 Cal. 527....	206
Robinson v. State.....	Embezzlement	109 Ga. 564.....	392
Romeo v. Martacci	Factors	72 Conn. 504....	327
Rowe v. Raper.....	Funeral Expenses..	23 Ind. App. 37..	411
San Antonio etc. Ry. Co. v. Southwestern Tel. etc. Co....	Telegraph Companies	93 Tex. 313.....	884
Scheibel v. Anderson.....	Redemption	77 Minn. 54....	664
Scherer v. Scherer.....	Husband and Wife..	23 Ind. App. 384	437
Scottish etc. Ins. Co. v. Harriott..	Taxation.....	109 Iowa, 608....	548
Shea v. Shea.....	Attachment	154 Mo. 599....	779
Simonton v. White.....	Shelley's Case.....	93 Tex. 50.....	824

NAME.	SUBJECT.	REPORT.	PAGE.
Sisson v. Sommers.....	<i>Mining Claims</i>	24 Nev. 379....	815
Smalley v. Bodinus.....	<i>Notaries</i>	120 Mich. 383....	602
Southern Ry. Co. v. Shields.....	<i>Contributory Neg.</i>	121 Ala. 460....	66
Spooner v. Travelers' Ins. Co.....	<i>Fraud. Conveyance</i>	76 Minn. 311....	651
State v. Abley.....	<i>Assent to Crime</i>	109 Iowa, 61....	520
State v. Clausmeier.....	<i>Sheriffs—Libel</i>	154 Ind. 599....	511
State v. Crosby.....	<i>Courts-martial</i>	24 Nev. 115....	786
State v. Frey.....	<i>Witnesses—Rape</i>	76 Minn. 526....	660
State v. Greenwood.....	<i>Forgery</i>	76 Minn. 211....	632
State v. Haskins.....	<i>Libel</i>	109 Iowa, 656....	560
State v. Keokuk etc. R. R. Co.....	<i>Taxation</i>	153 Mo. 157....	704
State v. Rosenbaum.....	<i>Former Acquittal</i> ...	23 Ind. App. 236	432
State v. Wagener.....	<i>Police Power</i>	77 Minn. 483....	681
State ex rel. Wyatt v. Ashbrook...	<i>Taxation</i>	154 Mo. 375....	765
Stevens v. Leonard.....	<i>Wills—Undue Influence</i> }	154 Ind. 67.....	446
St. Louis etc. Ry. Co. v. Tonhey..	<i>Railroads</i>	67 Ark. 209....	109
Sutton v. Rosser.....	<i>Homestead</i>	109 Ga. 204....	367
Theopold v. Deike.....	<i>Alteration of Note</i> ..	76 Minn. 121....	607
Thomas v. Thomas.....	<i>Alteration of Will</i> ..	76 Minn. 237....	639
Thompson v. Robinson.....	<i>Vendor & Purchaser</i>	93 Tex. 165....	843
Triple Link etc. Assn. v. Williams.	<i>Life Insurance</i>	121 Ala. 138....	34
Ueland v. Johnson.....	<i>Judgments</i>	77 Minn. 543....	698
Union Fraternal League v. Walton.	<i>Benefit Societies</i>	109 Ga. 1.....	350
University of Utah v. Richards. }	<i>Statutory Construction</i> }	20 Utah, 457....	928
Vickery v. Crawford	<i>Sequestration</i>	93 Tex. 373.....	891
Watson v. New Milford.....	<i>Pollution of Waters</i> . 72 Conn. 561....		345
Weidman v. Symes	<i>Filling Blanks</i>	120 Mich. 657....	603
Western Assur. Co. v. McAlpin.. }	<i>Insurance—Oral Contract</i> }	23 Ind. App. 220	423
Western Union Tel. Co. v. Griffin.	<i>Damages</i>	93 Tex. 530....	896
Westmeyer v. Gallenkamp.....	<i>Infants—Process</i> ...	154 Mo. 28.....	747

AMERICAN STATE REPORTS.
VOL. LXXVII.



CASES
IN THE
SUPREME COURT
OF
ALABAMA.

**BESSEMER LAND AND IMPROVEMENT COMPANY v.
CAMPBELL.**

[121 Alabama, 50.]

PLEADING TO SHOW THAT ACTS WERE THOSE OF DEFENDANT'S SERVANT.—AVERMENTS IN A COMPLAINT that a certain person was in the employment and service of the defendant, that he had superintendence intrusted to him, that he was negligent while in the exercise of such superintendence, and that he was the defendant's superintendent, clearly show that such superintendence was intrusted to him by the defendant.

NEGLIGENCE—SPECIFIC ACTS.—In an action to recover for injury resulting from negligence, averments of specific acts of negligence are not required.

NEGLIGENCE—CARE REQUIRED TO PRESERVE HUMAN LIFE.—When human life is at stake, the rule of due care and diligence requires everything that gives reasonable promise of its preservation to be done, regardless of difficulties or expense. The person upon whom the duty of action rests does not discharge it by using only the means immediately at hand, unless such means are adequate.

NEGLIGENCE—VICE-PRINCIPAL.—An employer's liability for the negligent act of his vice-principal or superintendent cannot be measured by the latter's poise of temperament, nor can the character of a given act of the superintendent in respect to negligence be made to depend upon his excitability, or the reverse. It is his duty to do what an ordinarily careful and prudent man would do under the same circumstances. Falling in this his employer is liable.

PRESUMPTION OF AGENT'S AUTHORITY.—IT IS PRESUMED that the superintendent of a mining corporation has deputed to him all the powers and authority necessary to a proper discharge of the duties imposed upon him. It is his manifest duty to extinguish a fire in the company's mine in a proper manner, and, prima facie, he has the correlative authority to provide proper means to that end.

MASTER AND SERVANT—ASSUMPTION OF EXISTENCE OF RELATION.—If, in an action to recover for personal injury, the fact that a certain person was the defendant's superintendent is proved by his own and other evidence, and in no way denied nor disputed, it is not ground for reversal of the judgment that the court in its instructions assumed the existence of such relation.

NEGLIGENCE.—IF DUE CARE AND DILIGENCE demand another course than the one taken by the superintendent of a mine in extinguishing a fire, his employer cannot avoid liability by evidence that the superintendent consulted the operatives in the mine, and acted on their advice.

NEGLIGENCE — DUTY TO ESCAPE. — AN EMPLOYE PLACED IN DANGER OF HIS LIFE by the negligence of his superior is not absolutely bound to escape, if there is time for him to do so, but only to do all that a man of ordinary care and diligence would have done under the circumstances to escape.

NEGLIGENCE—DAMAGES—MEASURE OF.—In an action to recover for the negligent killing of an employé, his recovery cannot be limited to the amount he would have contributed to the support of his dependent next of kin if the evidence tends to show that he saved part of his wages after paying the living expenses of himself and those dependent upon him.

NEGLIGENCE—DAMAGES—MEASURE OF.—In an action to recover for the negligent killing of an employé, shown to be a strong, healthy, sober, and industrious young man, a regular worker and experienced miner, the defendant is not prejudiced by evidence that an average miner, in "good health, and strength, and industry could dig from five to nine tons of coal a day at those mines at that time," when such evidence is introduced to determine the earning capacity of the plaintiff.

NEGLIGENCE—EVIDENCE.—In an action to recover for the negligent killing of an employé, evidence to show the feasibility of getting water in a certain way to extinguish a fire, and thus have saved plaintiff's life, is admissible.

W. Percy, for the appellant.

Bowman & Harsh, Campbell & Thomas, and C. P. Beldon, for the appellee.

⁵⁵ **McCLELLAN, C. J.** The complaint originally contained ten counts. Demurrers were sustained to some of them, and upon the rest, except four, the affirmative charge was given for the defendant. Those upon which the verdict for plaintiff was rendered, are the sixth, seventh, eighth, and ninth. The sixth count is as follows: "Plaintiff [J. N. Campbell, as administrator of the estate of Henry Reever, deceased] claims of the defendant fifteen thousand dollars as damages for that heretofore, to wit, on the fifteenth day of September, 1897, defendant was running and operating a coal mine at or near Belle Ellen, in Bibb county, Alabama, and on said day plaintiff's intestate was in the service or employment of the defendant in or about said

business of the defendant, and while said intestate was in said mine in and about said business as aforesaid, a fire broke out or was burning in said mine, and said fire caused smoke, or gases other than ⁵⁶ air to be in said mine in such quantity or density that said intestate was suffocated or asphyxiated, so that as a proximate consequence thereof he died. And plaintiff further avers that his said intestate was suffocated or asphyxiated and his death was caused as aforesaid as a proximate consequence and by reason of the negligence of a person in the service or employment of the defendant, who had superintendence intrusted to him whilst in the exercise of such superintendence, viz., defendant's superintendent or bank boss, to wit, *L. W. Johns, negligently failed to take due and proper precautions to prevent said fire from causing said suffocation or asphyxiation and death of plaintiff's intestate.*"

The only difference between this count and the seventh, eighth, and ninth is in respect of the averments of the negligent acts and omissions of said L. W. Johns, which we have italicized above. The averment in the seventh count is that said Johns "negligently caused or allowed said smoke or gas, other than air, to be in or be conveyed to that part of said mine where plaintiff's intestate was as aforesaid." In the eighth it is that Johns "negligently caused or allowed the ventilator fan of said mine to be shut down or stopped too soon after the said fire was discovered." And in the ninth count it is averred that said Johns "negligently caused the mouth or openings of said mine to be closed after said fire was discovered and while plaintiff's intestate was in said mine." Defendant demurred to each of these counts on the grounds: 1. "It is not averred in any of said counts that the defendant intrusted said L. W. Johns with such superintendence"; and 2. That "the specific negligence which it is alleged said L. W. Johns is guilty of is not sufficiently set out in any of said counts." The demurrer was overruled; and that action of the trial court is presented for our consideration.

Each of these counts avers that Johns was in the employment and service of the defendant, that he had superintendence intrusted to him, and that he was negligent while in the exercise of such superintendence, and that he was the defendant's superintendent or bank boss. We do not think it requires discussion to demonstrate that any fair construction of these averments ⁵⁷ leaves no room to doubt that the superintendence which the defendant's superintendent had was intrusted to him

by the defendant: Woodward Iron Co. v. Herndon, 114 Ala. 191, 214, 215.

In the averment of the negligence of the superintendent, Johns, each of the counts—even the sixth—is sufficient under the rule which has been too often declared by this court and has been too long established to be now departed from; the averment of specific negligence is not required: Georgia Pac. Ry. Co. v. Davis, 92 Ala. 307; Laughran v. Brewer, 113 Ala. 509, 514, 515, and cases there cited.

A fire in a coal mine is not a thing for an hour or a day. It may burn for days and weeks and months. And a fire, it is inferable upon some tendencies of the evidence in this case, may be so located in the mine with reference to the slope, the air course, the entries, and chambers as that persons in recesses of the mine beyond it may survive for some indefinite time while the conflagration is raging in a part of the mine. How long life could be sustained when the fire begins half way down a six or seven hundred feet slope in the brattice of a cross-cut leading into the air course and immediately burns through the brattice, thus facilitating to a greater or less extent the carrying off of the heat, smoke, and gases through the air course and away from the lower reaches of the mine, where persons are imprisoned, is not shown in this case, and in the nature of things could not be with any approach to definiteness. A witness testifies that a man could not have lived in there more than an hour and a half under any state of facts supported by tendencies of the evidence. This was his opinion as a mine expert, but it was conjectural at best, and weakened by other opinions expressed by this witness which were in conflict with common knowledge. With unobstructed ingress and egress of air down the slope to the fire and then up the air course, it would seem that the exhaustion of oxygen in the air below the fire would be slow indeed. And so too the filling of the lower spaces with smoke and gases. And under these circumstances a man in the mine three or four hundred feet below the fire might live for several days, so far as smoke and gas ^{as} coming down on him and the sterilization of the atmosphere around are concerned. Of course, he would have less time if the opening at the fire into the air course was too small for the passage of all the hot air and smoke produced by the fire, and of course, too, his span of life would be further abridged by the spread of the fire toward him. And then, too, if the fire attacked the brattice on the side next the slope, there must have been some

time before that was burnt through and a passage there made for the smoke and gases into the air shaft, and while this state of things continued the smoke would have naturally gone down the slope until it reached the lower end of the air course, thus tending to fill the mines at once. But it is not certain that the fire began on the slope side of the brattice. There is evidence that more headway was made by it in the air shaft than in the slope; and it is a fact of some pregnancy that the men working in the entries below the fire were not warned of its existence by smoke coming down there, but had to be called away by a person sent down into the mine some time after the inception of the fire. It further appears that they experienced no difficulty with the smoke until they reached the point of the fire as they came up the slope, and it does not appear that the person sent to them had any difficulty with smoke opposite the point of the fire as he went down to the men, all of which affords grounds for an inference to be drawn by the jury that the fire originated in the air shaft, and that smoke got into the slope only after the brattice had been burned through from the shaft, and, of course, that from the moment there was any fire in the slope there was exit from it for the smoke into the air shaft. And it appears to be certain that the air course was belching smoke before there was any indication of it in the lower part of the mine. We refer to these several tendencies of the evidence, in consonance with which the jury might have found the facts, to demonstrate the uncertainty that must necessarily have hedged about the inquiry as to how long the intestate lived in the mine after the fire, or rather might have lived had the slope and air course been left open, and as a basis for our conclusion that that inquiry was peculiarly one for the jury. The court ^{so} could not have been justified in fixing any definite limit to the period the intestate would have survived if the mine had been left open. It could not have assumed that he would have died in a day, or two or three days or a week, nor could it have assumed, of course, that the jury would find that he could not have lived long enough for the means adequate to his rescue to have been procured and used. The whole matter was for the jury; and to enable them to say whether Johns was at fault in not procuring the means to extinguish the fire, by other process than smothering it out and smothering, maybe, the intestate's life out along with it, the court properly admitted the evidence tending to show that such means could have been

procured. And it is no objection to this evidence that it went far afield. If Reeves' life could have been saved by telegraphing to New York or to Chicago for hose with which to flood the fire, it was upon the defendant's superintendent to so telegraph and have the appliances sent by express. And so, if that would have met the occasion, he should have telegraphed to Birmingham, sixty miles away, where such appliances were generally kept, and, if need had been, have had them sent out by a special train. Where human life is at stake the rule of due care and diligence requires everything that gives reasonable promise of its preservation to be done regardless of difficulties and expense. The person upon whom the duty of action rests does not discharge it by using only the means immediately at hand. If a man is in a place where he will sooner or later be burned to death, and the person upon whom rests the duty of rescue has not at hand a bucket of water with which to extinguish the fire and save the life, but there is time for him to go and get it, he must go and get it. If it is necessary and there is time for him to go a mile for it, he must go that mile for it. Or if a man is lashed to the top of a tree and like to starve to death, the person whose duty it is to save him cannot excuse himself because he has no ladder; he must fetch one, and he must go as far as is necessary to fetch one within the time the man may survive. In the case we have, it being for the jury to find how long Reeves would have survived had the slope and air shaft not been ^{so} bratticed up, it was proper to lay before them evidence tending to show what Johns might have done during such time toward providing means adequate to his rescue.

We do not understand that an employer's liability for the negligent act of his superintendent can be measured by the latter's poise of temperament, nor that the character of a given act of the superintendent in respect of negligence can be made to depend upon his excitability or the reverse. It is the duty of a superintendent to do what an ordinarily careful and prudent man would do under the same circumstances, and the employer is liable if he fail to do this and injury results to an employé. To hold, as we are urged to do by counsel for appellant, that there can be no liability where the duty has been neglected because of supersensitiveness of the superintendent's nervous system would be to allow employers generally to escape the burden the statute puts upon them by employing superintendents who are especially excitable and given to los-

ing their heads on important occasions. There is a well-established doctrine, applicable mainly, if not entirely, under pleas of contributory negligence, to the effect that where a party has been suddenly placed in a position of extreme peril, and thereupon does an act which, under the circumstances known to him, he might reasonably think proper, but which those who have knowledge of all the facts and time to consider them, are able to see was not in fact the best, he will not be held to have been negligent in so acting; but, as indicated in this statement of the proposition, and as has been expressly ruled by this court, his conduct even in such case is measured by the standard of the care and prudence an ordinarily careful and prudent man would have exercised under the circumstances. Thus we have said: "The fact, if it be one, that the intestate was panic stricken and his energies paralyzed by the awful nature of the impending catastrophe, might be proper to be considered by the jury in determining what effort amounted to due diligence, or what omission of effort would be negligence under all the circumstances; but no such consideration can relieve from the duty of diligence on the one hand, or condone negligence ⁶¹ on the other": *Holland v. Tennessee etc. R. R. Co.*, 91 Ala. 444, 454. We are not aware that this doctrine has ever been applied to a defendant's superintendent; and there is no predicate for its application in any case in the absence of personal peril to the party seeking to have his conduct measured by reference to it. But, however all that may be, the defendant here was not entitled to a more favorable rule than that laid down by the trial court, holding Johns to the same care and diligence that would have been exercised by a man of ordinary care and prudence under the same circumstances. The law cannot take any account of those personal idiosyncracies of a superintendent which tend to perturb him on occasion beyond ordinary men.

There is a presumption that the superintendent of the mining operations of a corporation has deputed to him all the powers and authority necessary to a proper discharge of the duties imposed upon him. It is his manifest duty to extinguish a fire in the company's mine in a proper manner, and *prima facie* he has the correlative authority to provide means to that end. This presumption concurs with all the evidence in this case to the conclusion that Johns had authority to purchase and procure the necessary appliances to extinguish this fire; and the court below was not at fault in assuming the existence of such authority.

Most of the rulings of the city court to which exceptions were reserved are referable to and supported by the foregoing views. Those that are not we will discuss separately.

The usual order observed in submitting requests for instructions to the trial judge is for the plaintiff's requests to be first submitted and granted or refused, and then those of the defendant. We presume that order was observed on the trial of this case. Therefore, when charge 2 was given for plaintiff in respect of Johns' supposed fault as to the inception of the fire, the affirmative charge for the defendant as to the fourth count had not been given and that count was still in the case. On this state of the record the most that can be said of that charge (2) is that it was abstract, and this infirmity will not require a reversal of the judgment.

⁶² The fact that Johns was defendant's superintendent was proved over and over again on the trial and by his own evidence, and in no way denied or at all disputed. The fact that the court in some of the instructions assumed the existence of this relation cannot be ground for reversal.

It was in evidence that Johns consulted the operatives as to the expediency of bratticing up the mines and that they expressed the opinion that that was the best thing to be done. Very clearly this did not make it the best thing to be done, nor relieve Johns from the duty of taking some other course, if, in the exercise of due care and diligence, another course should have been pursued. He could not in this way shift the responsibility which was upon him.

The complaint charges that Johns negligently caused or allowed the fan to be stopped too soon. If it was not stopped at his order, but he allowed it to be stopped, the averment of the count is proved. Charge 2 refused to defendant was, therefore, too narrow.

Charge 4 refused to defendant would have exacted too high a degree of diligence from Reeves. He was not absolutely bound to escape if there was time for him to have escaped, but only to do all that a man of ordinary care and diligence would have done under the circumstances to escape. It is fallacious to say that because his life depended on it he was bound to exercise the highest possible degree of diligence and care and to make no mistakes in the methods he adopted to save his life. The rule is one of ordinary and reasonable care at all times, regardless of what the threatened consequences are; and it may be on a principle referred to in another part

of this opinion that the awful character of the impending danger, the imminency of loss of life, itself shaded the general rule, or rather was to be taken into account by the jury favorably to the plaintiff in determining what a man of ordinary care and prudence would have then and there done.

There was evidence in the case tending to show that Reeves saved a part of his wages after paying the living expenses of himself and those dependent upon him. It would therefore have been error for the court to limit ^{as} the recovery to the amount he would have contributed to the support of his dependent next of kin.

The testimony of the witness, John White, that "at the time the bratticing was begun the fire must have been on the slope and air course," was obviously a mere conclusion of the witness, and was properly excluded, as was also the statement of the witness McCall, "I am satisfied the return air course was on fire," and the proposed testimony of the witness Johns that "at the time he bratticed up the mine there was nothing he could have done to save the men," and "that it was not practicable to put out the fire except by bratticing up the mines with the appliances we had." These statements of Johns covered, indeed, the very issues which the jury were trying.

It was in evidence that Reeves was a strong, healthy, sober, and industrious young man, a regular worker and an experienced miner. In determining his earning capacity the defendant could not have been prejudiced by the evidence that an average miner, "in good health and strength and industry, could dig from five to nine tons of coal a day at those mines at that time." If there is any inaptness in the comparison, it is unfavorable to the plaintiff.

The fact that before the fire there had been a pipe line extending from the mine to Cahaba river, a distance of a mile and a half, tended to show the feasibility of getting water through that line if it still existed, or through a line to be relaid there if it had been taken up, in time to extinguish the fire in that way while the intestate still survived; and evidence was properly received of the fact.

The testimony of Duncan as to the inspection he had made, etc., was competent under counts then in the case.

The judgment must be affirmed.

NEGLIGENCE.—A GENERAL ALLEGATION of negligence is good against demurrer, but on motion the pleader may be required to specifically state in what the negligence consisted: Fremont etc.

R. R. Co. v. Harlin, 50 Neb. 698, 61 Am. St. Rep. 578. See, too, **Snyder v. Wheeling Electrical Co.**, 43 W. Va. 661, 64 Am. St. Rep. 922; **Omaha etc. R. R. Co. v. Crow**, 54 Neb. 747, 69 Am. St. Rep. 741.

NEGLIGENCE.—THE DEGREE OF CARE required in order to avoid liability for negligence must be proportioned to the nature of the act performed, the place where performed, and the extent of danger and injury likely to result from a failure to use due care: **Houston etc. Ry. Co. v. Boozer**, 70 Tex. 530, 8 Am. St. Rep. 615. More care must be used where there is greater danger: **Galveston etc. Ry. Co. v. Gormley**, 91 Tex. 393, 66 Am. St. Rep. 894. In the management of agencies which may cause death or serious injury, the utmost care is required: **Perham v. Portland Electric Co.**, 33 Or. 451, 72 Am. St. Rep. 730.

NEGLIGENCE—DUTY OF PERSON IN PERIL.—When a person is placed in peril through the negligence of another, he need make only an effort to protect himself, and if he errs in judgment in seeking safety, he cannot be said to be guilty of negligence: **Blackwell v. Lynchburg etc. R. R. Co.**, 111 N. C. 152, 32 Am. St. Rep. 786. See, too, **Consolidated Traction Co. v. Scott**, 58 N. J. L. 682, 55 Am. St. Rep. 620.

DEATH BY WRONGFUL ACT.—THE MEASURE OF DAMAGES for negligently causing the death of a human being is treated in the monographic note to **Louisville etc. Ry. Co. v. Goodykoontz**, 12 Am. St. Rep. 875-388. The standard for the measurement of damages is the pecuniary value of the life of the person killed to the beneficiaries: **Missouri Pac. Ry. Co. v. Moffatt**, 60 Kan. 113, 72 Am. St. Rep. 343.

MASTER AND SERVANT—VICE-PRINCIPAL.—A servant, agent, or employé, while performing a duty required of the master, becomes a vice-principal, for whose negligence the master is liable: See the extended note to **Mast v. Kern**, 75 Am. St. Rep. 591, on vice-principals.

MASTER AND SERVANT.—THE SUPERINTENDENT of a mine, having general and entire charge of the work, is a representative of the master, and the master is liable for the superintendent's neglect of duty: See the extended note to **Mast v. Kern**, 75 Am. St. Rep. 626.

INSTRUCTIONS ASSUMING FACTS.—When there is no conflict in the evidence, the court in instructing the jury may assume it to be true: **Bynon v. State**, 117 Ala. 80, 67 Am. St. Rep. 163.

Diligence Required When Human Life is Involved.

The rule announced in the principal case, that where human life is at stake due care and diligence require everything to be done that gives reasonable promise of the preservation of such life, regardless of difficulties or expense, finds support in the rule universally applied to common carriers of passengers that they are bound to use the utmost care and diligence for the safety of passengers, and are liable for an injury to a passenger occasioned by the slightest neglect against which human prudence and foresight might have guarded. This rule has been applied against common carriers of passengers by rail ever since the invention and operation of steam railroads and its announcement may be found in the following cases: **Evansville etc. R. R. Co. v. Athon**, 6 Ind. App. 205, 51 Am. St. Rep. 303; **West Chicago etc. R. R. Co. v. Johnson**, 180

Ill. 235; *McCurrie v. Southern Pac. Co.*, 122 Cal. 558; *International etc. Ry. Co. v. Welch*, 86 Tex. 208, 40 Am. St. Rep. 829; *Louisville etc. R. R. Co. v. Minogue*, 90 Ky. 369, 29 Am. St. Rep. 378; *Alabama etc. R. R. Co. v. Hill*, 93 Ala. 514, 30 Am. St. Rep. 65; *Chicago etc. R. R. Co. v. Pillsbury*, 123 Ill. 9, 5 Am. St. Rep. 483; *Deyo v. New York Cent. R. R. Co.*, 34 N. Y. 9, 89 Am. Dec. 418; *Johnson v. Winona etc. R. R. Co.*, 11 Minn. 296, 88 Am. Dec. 83; *Baltimore etc. R. R. Co. v. Worthington*, 21 Md. 275, 83 Am. Dec. 578; *State v. Baltimore etc. R. R. Co.*, 24 Md. 84, 87 Am. Dec. 600; *Gillenwater v. Madison etc. R. R. Co.*, 5 Ind. 339, 61 Am. Dec. 101; *Pennsylvania Co. v. Roy*, 102 U. S. 451; *Railway Co. v. Sweet*, 60 Ark. 550; *Chicago etc. R. R. Co. v. Landauer*, 39 Neb. 808. The rule is applied to carriers of passengers by freight train as well as passenger train: *Indianapolis etc. R. R. Co. v. Horst*, 98 U. S. 291. And as well to carriers by water as by rail: *Steamboat New World v. King*, 16 How. 499; *Morrissey v. Wiggins Ferry Co.*, 48 Mo. 380, 97 Am. Dec. 402. The rule also applies with equal force to carriers of passengers by stagecoach, or other vehicles: *Farish v. Reigle*, 11 Gratt. 697, 62 Am. Dec. 666; *Tuller v. Talbot*, 23 Ill. 357, 76 Am. Dec. 695.

A carrier's duty is not ended with carrying his passenger safely from one point to another, but he must set the passenger down safely, if, in the exercise of the utmost care, it can be done: *Evansville etc. R. R. Co. v. Athon*, 6 Ind. App. 285, 51 Am. St. Rep. 303. A prima facie case is established when the plaintiff shows that he was injured while being carried as a passenger by the defendant, and that the injury was caused by the act of the latter acting as a common carrier, and in operating the instrumentalities employed in his business: *McCurrie v. Southern Pac. Co.*, 122 Cal. 558. In *Pennsylvania Co. v. Roy*, 102 U. S. 456, Mr. Justice Harlan, in delivering the opinion of the court, and speaking of the rule under consideration, said: "The carrier is required, as to passengers, to observe the utmost caution characteristic of very careful, prudent men. He is responsible for injuries received by passengers in the course of their transportation which might have been avoided or guarded against by the exercise upon his part of extraordinary vigilance, aided by the highest skill. And this caution and vigilance must necessarily be extended to all the agencies or means employed by the carrier in the transportation of the passenger. Among the duties resting upon him is the important one of providing cars or vehicles adequate, that is, sufficiently secure as to strength and other requisites, for the safe conveyance of the passengers. That duty the law enforces with great strictness. For the slightest negligence or fault in this regard, from which injury results to the passenger, the carrier is liable in damages. These doctrines, to which the courts, with few exceptions, have given a firm and steady support, and which it is neither wise nor just to disturb or question, would, however, lose

much, if not all, of their practical value, if carriers were permitted to escape responsibility upon the ground that the cars or vehicles used by them and from whose insufficiency injury has resulted to the passenger, belong to others": *Pennsylvania Co. v. Roy*, 102 U. S. 451-456.

The rule above announced applies to street-car companies, no matter what their motive power. Thus, in *Topeka City Ry. Co. v. Higga*, 38 Kan. 375, 5 Am. St. Rep. 754, it was decided that street railway companies, as carriers of passengers, are bound to exercise all possible skill, foresight, and care in running their cars, so that passengers may not be exposed to danger on account of the manner in which the cars are run, and such skill and care include the exercise of every reasonable precaution to prevent injury to passengers, and imply that there shall be good tracks, safe cars, careful management, and judicious operation in every respect. All possible foresight means more than this; it means anticipation, if not knowledge, that the operation of street-cars will result in danger to passengers, and that there must be some action with reference to the future, a provident care to guard against such occurrences, a wise foresight and prudent provision that will avert the threatened evil, if human thought or action can do so. Such companies are liable for the slightest negligence, which is usually presumed from the happening of an accident. To the same effect: *Spellman v. Lincoln Rapid Transit Co.*, 36 Neb. 890, 38 Am. St. Rep. 753; *Pray v. Omaha St. Ry. Co.*, 44 Neb. 167, 48 Am. St. Rep. 717; *Lincoln St. Ry. Co. v. McClellan*, 54 Neb. 672, 69 Am. St. Rep. 736; *Citizens' St. R. R. Co. v. Merl*, 134 Ind. 609; *Reynolds v. Richmond etc. Ry. Co.*, 92 Va. 400; *West Chicago St. R. R. Co. v. Johnson*, 180 Ill. 285; *North Chicago St. Ry. Co. v. Cotton*, 140 Ill. 486. This doctrine does not apply to trespassers or licensees upon a railroad track. As to them, the railroad company owes no duty until their discovery upon the track, and then need exercise only reasonable care to prevent injuring them, and is liable only when injury is wantonly or willfully inflicted: *Barney v. Hannibal etc. R. R. Co.*, 126 Mo. 872; *Earl v. Chicago etc. Ry. Co.*, 109 Iowa, 14, post, p. 516, and note; *Purcell v. Chicago etc. Ry. Co.*, 109 Iowa, 628, post, p. 557, and note; *Chicago etc. Ry. Co. v. Caulfield*, 63 Fed. Rep. 396. Hence an instruction which requires all the care possible and the highest possible care as the amount of watchfulness required to discover and to prevent injury to a licensee or trespasser on the track is erroneous: *Chicago etc. Ry. Co. v. Caulfield*, 63 Fed. Rep. 396; *Mobile etc. Ry. Co. v. Watby*, 69 Miss. 145.

One who owns or operates a passenger elevator, either by himself or his agent, is bound, at all times, to exercise the highest possible degree of care and caution, both as to its construction, repair, and operation, to make it safe for all persons, whether passengers or employes, who have a right to use it, or who use it, with the owner's knowledge or consent. A person running an elevator in

his place of business is held to undertake to carry safely persons riding therein as fully as human care and foresight can do. He is held to extraordinary diligence and liable for the slightest neglect in the management or care of such elevator: *Treadwell v. Whittier*, 80 Cal. 575, 13 Am. St. Rep. 175; *Hartford Deposit Co. v. Sollitt*, 172 Ill. 222, 64 Am. St. Rep. 35; *Southern Bldg. etc. Assn. v. Dawson*, 97 Tenn. 367, 56 Am. St. Rep. 804, and extended note thereto, 806-810, where the diligence and care required of elevator owners is thoroughly discussed.

Another situation where the rule under discussion is applied is where a person or company uses wire to convey electricity. They are required to use very great care to prevent injury to person or property. A failure to raise such wire so high above a roof that those having occasion to go there will not come in contact with it is negligence. The fact that a dangerous agency, such as electricity, is used as a commodity raises no presumption that the public know enough of its nature to avoid the danger arising from its use, and the public, aside from consumers, owe no duty to those introducing it. On the other hand, it is the duty of those making a profit from the use of such a dangerous element to use the utmost care to prevent injury to all classes of persons, and they must protect those possessing less than ordinary knowledge of the character of the commodity. Hence, a person brought in contact with electric wires is not required to exercise more care to avoid injury than is usual under similar circumstances among careful and prudent persons of the class to which he belongs, unless he is especially informed of the danger. A common laborer is not required to use as much care and prudence as is exacted of a better educated person: *Giraudi v. Electric Imp. Co.*, 107 Cal. 120, 48 Am. St. Rep. 114; *Perham v. Portland Electric Co.*, 33 Or. 451, 72 Am. St. Rep. 730, and note, 754.

A corporation permitted to construct and maintain a line of electric wires in the public streets for the purpose of private gain owes the duty to persons upon the street of so conducting its business as not to injure them. It must, therefore, keep its wires out of the way of persons using the streets so that they will not receive personal injury by coming in contact with such wires. Such corporations are held to the highest degree of care in regard to the construction, inspection, and repair of their wires and poles, and are liable for the slightest neglect. Negligence is inferred from the happening of an accident, and proof that there was a live wire down in the street, carrying a deadly current of electricity, raises a presumption of failure of duty to the public: *Haynes v. Raleigh Gas Co.*, 114 N. C. 203, 41 Am. St. Rep. 786, and note, 792.

Persons using a powerful explosive in blasting are charged with knowledge of any fact in reference to its actual effect that they could by reasonable diligence have ascertained. They come within the rule under discussion, and must exercise the highest possible

care and diligence to prevent injury to others that human foresight is capable of. They must adopt all possible means to protect persons placed in danger by the explosion of a blast, and a failure to perform this duty is negligence for which they are liable in damages. If a person is placed in danger through the negligence of another in exploding a blast, he need only make an effort to protect himself, and, if he makes a mistake and errs in judgment in seeking safety, he cannot be held guilty of negligence: *Blackwell v. Lynchburg etc. R. R. Co.*, 111 N. C. 151, 32 Am. St. Rep. 786. The same degree of care is required of dealers in, or transporters of, high explosives, or combustible oils: *Henry v. Cleveland etc. R. R. Co.*, 67 Fed. Rep. 426.

The rule we have been considering applies to every conceivable situation where one person owing some duty to another places the life of that other in danger. Thus a person engaged with tools and materials upon a scaffolding erected directly over a thoroughfare where people are constantly traveling, is required to exercise the highest degree of possible care in the performance of his work, so that passers by may not be injured, and evidence showing that a traveler upon the sidewalk was injured by the fall of a tool from the scaffolding is sufficient to establish a prima facie case of negligence against the person working thereon: *Dixon v. Pluna*, 98 Cal. 884, 85 Am. St. Rep. 180.

CHRISTIAN & CRAFT GROCERY CO. v. MICHAEL.

[121 Alabama, 84.]

MORTGAGES—LIENS—AFTER-ACQUIRED PROPERTY.—

A mortgage of subsequently acquired property, especially by general terms of description, which is not the product, increase, or accretion of something already owned by the mortgagor, amounts to nothing more than a mere agreement to give a further mortgage, and confers no specific lien on such after-acquired property.

MORTGAGES—FRAUDULENT CONVEYANCES—RESERVATION OF BENEFIT TO MORTGAGOR.—If it is evident from the terms of a mortgage and the course of dealing between the mortgagor and mortgagee, that it is the understanding and intention between such parties that a benefit is to be reserved to the mortgagor, the mortgage is thereby rendered void under section 2150 of the Alabama code, as against existing or subsequent creditors of the mortgagor.

EXECUTION ISSUED PREMATURELY is not void, as such issue constitutes a mere irregularity.

EXECUTIONS—IRREGULARITY IN ISSUE.—A claimant in a trial of the right of property cannot complain of irregularity in the issuing of execution against the judgment defendant.

MacIntosh & Ritch, for the appellant.

G. L. & H. T. Smith, for the appellee.

DOWDELL, J. The claimant, on the trial in the court below, asserted title to the property in question, levied on by plaintiffs as the property of the defendant in execution, under a mortgage executed by defendant to claimant. The plaintiff having proved their debt against the defendant and the levy of the execution ^{on} on the property in defendant's possession, made a prima facie case; and unless the claimant offered evidence tending to show a better right or claim, the plaintiffs were entitled to the affirmative charge.

The mortgage offered in evidence by the claimant purported to convey a large quantity of real estate and personal property, and contained the following clause, namely: "Also all of the logs, timbers, lumbers, and other manufactured wood products that the said Monroe Mill Company may own or have on hand at the time of and subsequent to any default that may occur under the terms of this instrument." The mortgage also contained the following defeasance clause: "The conditions of the foregoing conveyance are such that, whereas the Monroe Mill Company is indebted to the said Christian & Craft Grocery Company in the sum of ten thousand dollars, evidenced by its three several negotiable promissory notes of even date herewith, payable to the order of itself at the First National Bank of Mobile, Alabama. One of the said notes being for the sum of three thousand dollars, payable sixty days after date; one of said notes being for three thousand dollars, payable four months after date; and the other of said notes being for four thousand dollars, and payable six months after date. Now, therefore, should the said Monroe Mill Company well and truly pay, or cause to be paid, said promissory notes at their respective maturities, then this conveyance is to be void, otherwise the same is to be and remain in full force and effect. Should default be made in any one of the payments of said notes at its maturity, then all of said promissory notes shall become due and payable, and the said Christian & Craft Grocery Company may, through such agents or attorneys as it may appoint, take possession of and sell all of its said property of every kind and description at public outcry, either for cash or upon such credit as it may deem to its best interest. Said sale to be made at Perdue Hill, and notice of the time, place, and terms of said sale to be given for ten days or more, by

posting written notices thereof upon the premises of the Monroe Mill Company, in Monroe county, and at least two public places in said county. And it is hereby expressly agreed ⁸⁷ that the said Christian & Craft Grocery Company may, if it sees fit so to do, bid at and become the purchaser of any of it, or all of said property, should its bid be the highest and best therefor."

The evidence, without conflict, shows that the defendant mill company was engaged in the manufacture of lumber; that it remained in possession of the property mortgaged and continued in the said business after the execution of said mortgage to claimant and after default had been made in the payment of the notes for which the mortgage had been given to secure, even on down to the time of the levy of plaintiffs' execution; that the logs which it cut and made into timber and lumber were obtained in part from the lands described in the mortgage, and in part from other sources; that the timber and lumber so manufactured by the defendant company was shipped to the claimant at Mobile, and by it, the said claimant, was sold and the proceeds of such sales applied largely to the unsecured account of the defendant company with claimant for supplies and advances, and part of such proceeds applied in payment of orders given by the defendant company to third persons or claimant, and only a small part of such proceeds were applied to the mortgage debt. There is no evidence that the logs and timber levied upon by plaintiffs' execution were cut from the land described in the mortgage. Nor is there any evidence in the case that the property levied on was the product of, or manufactured from logs owned by defendant mill company at the time of the execution of the mortgage, or until after default by the mortgagor under the terms of the mortgage. So far as the record discloses, it was after-acquired property, and acquired after default made by the mortgagor. It is said by this court in *Burns v. Campbell*, 71 Ala. 288: "So a mortgage of subsequently acquired property, especially by general terms of description, which is not the product, increase, or accretion of something already owned by the mortgagor, amounts to nothing more than a mere agreement to give a further mortgage. It confers no specific lien on such after-acquired property": Citing *Herman on Chattel Mortgages*, sec. 46; *Anderson v. Howard*, ⁸⁸ 49 Ga. 313; *Otis v. Sill*, 8 Barb. 102; 2 Kent's Commentaries, 468.

It is evident from the terms of the mortgage and the course

and conduct of dealing between the claimant and the defendant mill company, that it was the intention and understanding of the parties to the mortgage that the mortgagor mill company should continue in the possession of the property mortgaged, manufacturing timber and lumber from logs and selling the same for its, the said mill company's, account and benefit. Such was a reservation of benefit to the mortgagor, and it is immaterial whether it appeared in the face of the instrument, or was by a private understanding and agreement between the mortgagor and mortgagee, as to creditors of the mortgagor, the result would be the same. Such being true, the instrument was thereby rendered void as against the existing or subsequent creditors of the defendant mill company under the influence of section 2150 of the code: *Pugh v. Harwell*, 108 Ala. 490; *O'Neil v. Birmingham Brewing Co.*, 101 Ala. 388; *McDermott v. Eborn*, 90 Ala. 260; *Murray v. McNealy*, 86 Ala. 234, 11 Am. St. Rep. 33; *Owens v. Hobbie*, 82 Ala. 466; *Benedict v. Renfro*, 75 Ala. 121, 51 Am. Rep. 429.

The fact that the execution was issued prematurely constitutes only an irregularity, and does not render the execution void: *Draper v. Nixon*, 93 Ala. 438; *Sandlin v. Anderson*, 76 Ala. 405; *Steele v. Tutwiler*, 68 Ala. 107; *Freeman on Executions*, 25.

The irregularity of the execution was a matter of which the claimant could not complain: *Dollins v. Pollock*, 89 Ala. 356; *Sandlin v. Anderson*, 76 Ala. 405.

We find no reversible error in the record and the judgment of the circuit court is affirmed.

CHATTEL MORTGAGES ON AFTER-ACQUIRED PROPERTY are treated in the monographic notes to *Moody v. Wright*, 46 Am. Dec. 712-718; *Gregg v. Sanford*, 76 Am. Dec. 723-733; *McCaffrey v. Woodin*, 22 Am. Rep. 653-656. No lien on after-acquired goods is created by a provision in a mortgage that all stock replaced after the sale of any of the goods mortgaged shall be substituted for the original stock: *First Nat. Bank v. Lindenstruth*, 79 Md. 136, 47 Am. St. Rep. 366. Compare *Dexter v. Curtis*, 91 Me. 505, 64 Am. St. Rep. 266.

CHATTEL MORTGAGES—FRAUD ON CREDITORS.—Chattel mortgages allowing the mortgagor to remain in possession and to sell the property are treated in the note to *Peabody v. Landon*, 15 Am. St. Rep. 912-917. Under some circumstances, the fact that a mortgage stipulates that the mortgagor may remain in possession, and make sales of the mortgaged property, does not render the mortgage fraudulent as to creditors of the mortgagor: *Noyes v. Ross*, 23 Mont. 425, 75 Am. St. Rep. 543; *Francisco v. Ryan*, 54 Ohio St. 307, 56 Am. St. Rep. 711.

AN EXECUTION PREMATURELY ISSUED is not on that account void: *De Loach v. Robbins*, 102 Ala. 288, 48 Am. St. Rep. 46. Am. St. Rep. Vol. LXXVII.—3

TRIPLE LINK MUTUAL INDEMNITY ASSOCIATION v. WILLIAMS.

[121 Alabama, 188.]

INSURANCE—LIFE—PLEADING, PROOFS OF DEATH.—

In an action on a policy of life insurance, an averment in the complaint that the money claimed is due is not subject to demurrer for its failure to aver in terms that satisfactory proofs of the death of the assured were made ninety days before the bringing of the suit. If proof of death was not furnished seasonably before suit, it was matter for plea in abatement.

INSURANCE—LIFE—PLEADING.—A complaint in an action on a policy of life insurance which sets out the policy need not aver that defendant has money in its mortuary fund sufficient to pay the loss, nor set out the representations, agreements, and warranties referred to in the policy, and aver that such representations are true, and that the agreements and warranties have been kept and complied with. These are matters of defense, as is also the failure of the insured to pay assessments and mortuary calls.

INSURANCE—LIFE—MISREPRESENTATION IN APPLICATION—KNOWLEDGE OF AGENT.—If an applicant for life insurance states, in answer to a question by the insurance agent who fills the application, that his occupation is that of "foreman," but the agent writes "foreman of railroad yard," with full knowledge that the occupation of the applicant is that of foreman of a switching crew in a railroad yard, the company cannot avoid the policy on the ground of misrepresentation, in the absence of fraud, when the applicant is aware of the knowledge of the agent as to his occupation, and is without fault in making the statement. Under such facts, the knowledge of the agent is regarded as the knowledge of the insurer.

INSURANCE — LIFE — MISREPRESENTATION—KNOWLEDGE OF AGENT—WAIVER OF CONDITION.—An insurance company, by issuing a life policy to a foreman of a switch gang in a railway yard, when its agent who filled in the application had full knowledge of the occupation of the applicant, and stated an occupation less dangerous than the real one in the application without the fault of the applicant, waives a stipulation in the policy against the assured engaging in a hazardous employment or occupation.

INSURANCE — LIFE — MISREPRESENTATIONS — FORFEITURE.—If an applicant for life insurance falsely and intentionally states in his application that he is foreman of a railroad yard, when in reality he is foreman of a switch gang in such yard, a much more hazardous occupation, such misrepresentation avoids the policy issued thereon, although the agent taking and filling the application knew of the falsity of the statement at the time he sent the application to his company. In such case the agent must be regarded as being in collusion with the applicant or as being induced by him to get such false statement before the insurer.

INSURANCE—LIFE—DELIVERY OF POLICY.—The deposit of a life insurance policy in the mails, addressed to the insured, is a delivery to him, although he dies after it is so deposited and before receiving it.

INSURANCE—DELIVERY OF POLICY—PLEADING.—An averment in a pleading that a policy of insurance was signed and sealed by the insurer, and deposited in the mail, sufficiently alleges that it was so deposited by the insurer, and therefore that there was a delivery of the policy to the insured by its deposit in the mail.

INSURANCE—MISREPRESENTATIONS.—If an insurance company is misled by a false warranty intentionally made by the applicant as to his occupation, the knowledge of the agent of the insurer taking the application of such misrepresentation does not emasculate the warranty of its vitiating quality.

Lane & White and L. Y. Lipscomb, for the appellant.

B. C. Jones and J. E. Webb, for the appellee.

¹⁴² **McCLELLAN, C. J.** The second count avers that the money claimed is due. It is not open to the objection taken by the demurrer for its failure to aver in terms that satisfactory proofs of the death of the insured were made ninety days before the bringing of the suit. If proofs of death had not been furnished seasonably before suit, it was matter for plea in abatement. And, moreover, the evidence is free from conflict that such proofs were furnished ninety days before the action was begun, and, had the ruling been erroneous, it did not injure the appellant.

It was not necessary for the second count of the complaint, which set out the policy, to aver that the defendant had money in its mortuary fund sufficient to pay the loss, nor to set out the representations, agreements, and warranties referred to in the policy and aver that the representations were true and that the agreements and warranties had been kept and complied with. All these were matters of defense, as was also the insured's failure, if he did fail, to pay assessments and mortuary calls: 11 Ency. of Pl. & Pr. 415.

One of the defenses mainly relied on is that the insured made a false representation or warranty in his application for insurance as to his occupation. It is averred in the pleas that the insured, Williams, warranted that the statements made in his application were true, and that they were offered to the defendant as a consideration for the policy sued on, that the application was signed by Williams, and that therein, in answer to a ¹⁴³ question as to what was his occupation, he stated that he was "foreman of R. R. yard," that said answer was untrue, that Williams was not foreman of a railroad yard, but was in fact foreman of a switching crew in a railroad yard. It is also averred—and there is conflicting evidence on the point—

that there is in railroad service organization a position known as foreman of railroad yard, and that it is less hazardous than that of foreman of a switching crew in a railroad yard. To these pleas the plaintiff replied as follows: That J. A. McCluskey, who was the agent of the defendant to solicit persons to apply for insurance in the defendant company, applied to Williams to take out insurance in said company for one thousand dollars, and called upon him to make answer to several questions in a printed application there produced by said McCluskey; and amongst others was the question as to what was the occupation of the said Williams, "that the said McCluskey filled out at the time in his own handwriting the answers before the said Williams signed said application, that the said McCluskey, for answer to the said question as to what was Williams' occupation wrote, 'Foreman of R. R. yard,' when in fact the said Williams said to McCluskey as his answer to the question in regard to his occupation that he was 'foreman'; that shortly prior to the writing of said application, when engaged in soliciting said Williams to take out said insurance, either on that day, or the day before, said Williams had told McCluskey that he was foreman of the switch crew in the railroad yard, and that McCluskey had in fact been with said Williams while he had been in the discharge of his duties as such foreman of the switch crew but a short time before the writing out of said application, and well knew when the application was made that the said Williams was engaged in the employment of said railroad company as foreman of said switching crew." The sufficiency of this replication was challenged by demurrer on the ground that it did not negative fault on the part of Williams in signing and delivering the application containing the erroneous statement, written therein by McCluskey, that he was "foreman of R. R. yard," one of the assignments of demurrer being this: "Because said replication does not ¹⁴⁴ aver that the said Williams did not know that his answer to said question as to what was his occupation was written down 'foreman of R. R. yard' when he signed said application." The objection misconceives the replication and the principles of law underlying it. The theory of the replication is not that the agent without Williams' knowledge wrote down a misstatement in the application and sent it to the company, but is that the agent, McCluskey, and through him the company, knew the truth as to Williams' occupation, and, in the absence of fraud or fault on Williams' part, are to be held to have contracted

with reference to that knowledge and not with reference to a statement made by the agent in the application inconsistent with that knowledge, and that Williams was not at fault in respect of the statement, but that his answer was a truthful one, and, in view of McCluskey's previous knowledge of his occupation, was sufficiently full and accurate—such a one as any ordinary man would have made under the circumstances; and that being aware that the agent had full knowledge of his occupation, Williams had a right to assume not only that he would write down the fact correctly, but also that when the agent wrote down "foreman of R. R. yard" that was such a statement of his occupation as was proper to be made in the application, and was true and correct. It is therefore immaterial whether Williams knew his occupation had been so stated in the application when he signed it. The agent knew all the facts as to his occupation. He is presumed to know better than Williams how the facts should be stated in the application. Williams had a right to rely upon his making a correct statement of them, and the statement that he was "foreman of R. R. yard" having been written down, Williams had a right to rely upon it that that, for the purposes of the business in hand, was the correct and truthful statement. Of course, there might be such glaring repugnance between the fact and the statement in a given case that the applicant's failure to correct the statement would be evidence of fraud on his part; but this is not such case. Here Williams was a foreman in a railroad yard. He was, it is true, not foreman of the yard, but he was foreman of an engine and switching ¹⁴⁵ crew working in the yard, and the evidence is free from conflict to show that there was no other sort of foreman in that yard, and it tends to show that there was no other sort of foreman in any railroad yard. The fact that he allowed to pass unchallenged the statement of the agent that he was "foreman of R. R. yard" with full knowledge of it does not tend to show fault or fraud on his part. To the extent there might be difference and discrepancy between the fact and the statement he had a right to rely upon the better knowledge of the agent as to what statement for the purposes of this occasion correctly set forth his occupation. Upon the ground, therefore, that the company knew what Williams' occupation was, and that he was not at fault in respect of the statement made in the application, for that he was justified in assuming its correctness, his knowledge that the statement was embraced in the

application he signed is immaterial and the demurrer to the replication was well overruled: *Alabama Gold Life Ins. Co. v. Garner*, 77 Ala. 210; *Sellers v. Commercial Fire Ins. Co.*, 105 Ala. 282; *Creed v. Sun Fire Office*, 101 Ala. 522, 46 Am. St. Rep. 134; *Williamson v. New Orleans Ins. Assn.*, 84 Ala. 106.

But the knowledge or notice of the company itself on the facts set up in the replication was constructive merely; it did not have actual knowledge that Williams was the foreman of a switching crew, but the agent's knowledge on this subject is imputed to it. Now, if the facts were not as laid in the replication, but were different therefrom in respect of the answer made by Williams to the question, in that, as there is a tendency of the evidence to show, Williams in terms falsely represented to McCluskey that he was foreman of a railroad yard, and there was such a position and it was less hazardous than that of switch foreman, in our opinion, plaintiff should not be allowed to recover, although McCluskey knew or had been informed that Williams was foreman of a switching crew. In the case just put, the application containing the false statement furnished all the actual information the company itself had as to Williams' occupation, and by it the insurer was misled to issue the policy. McCluskey, in forwarding it, was either acting in collusion with Williams to defraud the company—and ¹⁴⁶all authorities concur that that is ground for avoiding the policy—or, at the very least, he was induced in some way by Williams to get that false statement before the company—either for that the fact of its being made caused him to doubt his knowledge or the correctness of his previous information on the subject, or otherwise—and in any event it would not have come to the company, they would not have acted upon it, they would not have been misled by it had Williams not made the false statement. On these tendencies of the evidence, therefore, Williams was clearly at fault in making the statement that he was foreman of a railroad yard; and sound principle, as well as the best considered adjudications, constrain us to hold that, if these be the facts, the misstatement avoids the policy, notwithstanding the agent knew the falsity of the answer when he wrote it down and sent the application to the company. This is the vitiating fault on the part of the applicant which is referred to in our own cases cited above, and which is so declared by the weight of authority in other jurisdictions: 1 May, on Insurance, sec. 133 B.

If the facts were as they were alleged in the replication—if Williams was not at fault in representing his occupation to the agent—if the agent knew his occupation, and hence the company—the issuance of the certificate to him was a waiver of the stipulation against his engaging in a hazardous occupation. On the case supposed, he was insured by the company while engaged to its knowledge in the only hazardous occupation in which he was engaged at all, and he was insured with respect to that occupation. He never changed his pursuits, but continued in them to the instant of his death. The defense that he violated the agreement not to engage in a hazardous occupation is, therefore, merely cumulative upon the defense that he misrepresented his occupation. If the latter fails, the former must fail also; and if the latter is made good, the former recovery is defeated without the aid of the latter.

Another defense much insisted upon is that the policy or certificate of insurance was never delivered to the insured, and hence that the contract sued on was not entered into by the defendant. There is a plea of non est factum ¹⁴⁷ setting up this defense, and issue was taken upon it. The evidence received on this issue was free from conflict to the effect that the policy was written out at the home office of the company in Chicago, Illinois, signed by its president and secretary, and mailed, duly stamped, on December 23, 1896, addressed to C. V. Williams, the person applying for the insurance, at Bessemer, Alabama, the place of his residence. Williams came to his death the following day, December 24, 1896. There can, of course, be no sort of doubt that on this state of case the mailing of the policy at Chicago was then and there in legal contemplation and effect a delivery of it to Williams on that day, December 23, 1896: 1 May on Insurance, secs. 46-49; 1 Bacon on Benefit Societies, secs. 272, 273; Hartford Fire Ins. Co. v. King, 106 Ala. 519. In this connection there was a special plea intended to set up that it was agreed by the terms of the application that the contract of insurance "should not take effect until the first assessment and admission fee was paid and said certificate of membership [the policy] delivered to said Charles V. Williams 'during his life and continuance in good health,' and defendant avers that said first assessment and admission fee was not paid, and said policy was not delivered to said Charles V. Williams 'during his life and continuance in good health.'" The plaintiff replied to this plea that the certificate was signed by the officers of the company whose names appear on the copy

thereof set out in the complaint, on the twenty-third day of December, 1896, and that about 2 P. M. on that day "the said policy so signed, with the seal of the company attached thereto, was placed in an envelope addressed to said Charles V. Williams at Bessemer, Alabama, and deposited at about 2 P. M. on said day in the postoffice at Chicago, Illinois; and that at that time the said Charles V. Williams was in life and in good health, and did not die until the twenty-fourth day of December, 1896; and the plaintiff further avers that on, to wit, the eighteenth day of November, 1896, J. A. McCluskey, who was the agent of defendant for soliciting insurance and who applied to the said Williams to take out a certificate of membership in the defendant company, at the time of doing so informed the said Williams that the sum of two ¹⁴⁸ dollars and forty-six cents was the amount of the first assessment and admission fee, which by the rules and regulations of the defendant was required to be paid by him on his certificate of membership in the Triple Link Mutual Indemnity Association for insurance limited to one thousand dollars; and that then and there the said Williams paid to the said McCluskey, as such agent, the said sum of two dollars and forty-six cents as such first assessment and admission fee, and the said McCluskey gave him a receipt therefor; and that the said McCluskey did not advise or inform said Williams then or at any other time that any other or greater sum than two dollars and forty-six cents was the first assessment and admission fee which was necessary to be paid in order to secure said insurance, nor did he demand of said Williams any other or different or greater sum than two dollars and forty-six cents for that purpose." The policy recites that Williams resided at that time at Bessemer, Alabama, and the policy was set out in the complaint. It was not necessary for this replication to reiterate his residence at that place, even conceding that there need have been any averment on that subject, which is by no means clear, since it may well be that the mailing of the policy to the place where the officers of the company supposed him to reside, as is evidenced by the recital, would as effectually evidence their intention to deliver it, though they may be mistaken in point of fact, as mailing it to his true address.

Nor is it a good objection to the replication that it fails to aver that the officers of the company put the policy in the mails at Chicago. The averment is that the policy was properly signed and sealed by the company, and about a stated hour

was placed in the postoffice at Chicago. The necessary implication is that it was mailed by the company. It would be an unreasonable and absurd construction of the averment to hold it to mean that this was done by a stranger without the assent of the defendant, and courts do not adopt absurd constructions even against a pleader.

The defendant rejoined to this replication "that, at the time assured paid the two dollars and forty-six cents set out in said replication, the said assured knew that the first assessment and admission fee was a sum greater than the amount paid by ¹⁴⁰ him, namely two dollars and forty-six cents." Read strictly, this is an averment that the greater sum was forty-six cents. But aside from that, the rejoinder was bad. McCluskey, representing and standing in the place of the company, had a right to bind it by accepting less than the initial fee, and, if he did so and the policy was issued, it is of no consequence that Williams knew that the regular and customary fee charged by the company was more than the company charged him.

The court in its general charge instructed the jury as follows: "It is for you to say, gentlemen of the jury, what answer was given to the agent. If you should say, from the evidence in this case, at the time when the application for the policy was made by Williams, the assured, that he, through inadvertence, or through intention, or for any other reason, misled or imposed upon the company in the matter of his statement of his occupation then he would not be entitled to recover. But if he made a statement of what his business was, although he did not go into detail of what it was, and the agent of the insurance company knew what his business was from any dealings or transactions with him while he was seeking to effect the policy of insurance between them, then that knowledge would be the knowledge of the company, and the company would be misled, not by any act of the assured, but by the act of the agent, if there was an answer to a question that was not true, and such mistake could not operate to the injury of the applicant, and the insurance company would be bound just as if the applicant has stated the facts truthfully." The defendant excepted to the last sentence in the foregoing instruction. On the principles we have above declared the exception is well taken. Where the insurance company is misled by a false warranty of the applicant as to his occupation, the knowledge of the agent of its falsity does not, as we have seen, emasculate the warranty of its vitiating quality.

Whatever his knowledge, it is to be presumed the agent would not have sent the false statement to his principal but for its having been made by the applicant; indeed, the greater and more accurate the agent's knowledge, the more certain it is that a statement contrary to the truth is due to the fault of the ¹³⁰ applicant. The court erred in the part of the charge under consideration, and the ruling is not aided by other parts of the general charge.

Upon the same considerations charges 5 and 17 refused to the defendant are only faulty, if at all so, in assuming that there was such a position in railroad service as foreman of a railroad yard. The remaining portions of the court's general charge and its other rulings upon charges requested by plaintiff and given, and requested by defendant and refused are in consonance with the views we have expressed in the course of this opinion.

We shall not discuss the rulings of the trial court on the admissibility of testimony. They have been examined and considered and found to be free from error prejudicial to appellant.

Reversed and remanded.

INSURANCE, LIFE—ENTRY OF FALSE ANSWERS.—If an application for life insurance is drawn by an agent of the insurer, and the answers to interrogatories contained therein are written by him in filing out the application, without fraud or collusion on the part of the applicant, the insurer is estopped to controvert the truth of such statements in an action upon the instrument: *Marston v. Kennebec etc. Ins. Co.*, 89 Me. 206, 56 Am. St. Rep. 412. Where an agent taking an application for insurance receives true answers and writes out false ones, the policy is regarded as based on the answers given, rather than on those fraudulently inserted: See the extended note to *Wheaton v. North British etc. Ins. Co.*, 9 Am. St. Rep. 232, 233. And where an applicant answers questions truthfully, false answers inserted by the medical examiner do not invalidate the insurance: *Royal Neighbors etc. v. Boman*, 177 Ill. 27, 69 Am. St. Rep. 201.

INSURANCE—DELIVERY OF POLICY.—Whether a policy has been delivered does not depend upon its manual possession by the assured, but upon the intention of the parties as manifested by their acts or agreements: *Phoenix Assur. Co. v. McAuthor*, 116 Ala. 659, 67 Am. St. Rep. 154. And if an officer of an insurance company fills out a policy with intent to have it take immediate effect, and causes it to be mailed to the applicant as of force and effect at that time, the company cannot claim there was no delivery, although the policy did not reach its destination until after the death of the applicant: See the monographic note to *New York Life Ins. Co. v. Babcock*, 69 Am. St. Rep. 147.

BIRMINGHAM WATER WORKS COMPANY v. HUME.

[121 Alabama, 168.]

HUSBAND AND WIFE—PROPERTY RIGHTS.—As between husband and wife, their rights in personal property coming to her attach under and are governed by the law of the place where they are domiciled at the time the property is received.

PRESUMPTION.—IT IS PRESUMED THAT THE COMMON LAW PREVAILS in states which are judicially known to be of common-law origin.

HUSBAND AND WIFE—CHOSES IN ACTION.—At common law, a husband is entitled, during coverture, to receive and to reduce to his possession and ownership all choses in action belonging to his wife at the time of the marriage, or which may accrue to her while the coverture continues.

HUSBAND AND WIFE—CHOSES IN ACTION—ASSIGNMENT.—A husband may, during the coverture, for a valuable consideration, assign the choses in action of his wife, which are capable of being immediately reduced to possession, so as to vest at least the beneficial ownership in the purchaser.

HUSBAND AND WIFE—WIFE'S CORPORATE STOCK—ASSIGNMENT BY HUSBAND.—Shares in the capital stock of a corporation belonging to a wife are choses in action and may be assigned for value by her husband without her concurrence or act of transfer.

Bill to compel a transfer of stock. In 1895, the appellant company issued a certificate of stock to Mrs. J. T. Johnson, who at that time lived with her husband in Tennessee. Mrs. Johnson at once indorsed the certificate in blank and gave it to her husband, who, for a valuable consideration, transferred it to Robbins and Gammon as collateral, and they filled up the indorsement signed by Mr. Johnson with their names. Johnson afterward redeemed the certificate and had it retransferred to him in writing. He then sold it to the plaintiff, Hume, and assigned it to him in writing. Hume brought this action against the appellant company to compel a transfer to him of the stock on its books, and the payment of the dividends. Judgment for plaintiff, and defendant appealed.

A. T. London, for the appellant.

J. E. Webb, for the appellee.

170 SHARP, J. As between the husband and the wife, their rights in personal property coming to the wife attach under and are governed by the law of the place where they are domiciled at the time the property is received: *McAnally v. O'Neal*, 56 Ala. 299; *Gluck v. Cox*, 75 Ala. 310; 3 Am. & Eng.

Ency. of Law, 575. The rule is established here that when the contrary is not shown, it will be presumed that the common law prevails in states which are judicially known to be of common origin with this state: *Inge v. Murphy*, 10 Ala. 885; *Connor v. Trawick*, 37 Ala. 289, 79 Am. Dec. 58; *Bradley v. Harden*, 73 Ala. 70; 1 *Brickell's Digest*, sec. 9, p. 349. The case of *Kennebrew v. Southern eta. Co.*, 106 Ala. 377, cited as being opposed to this rule was ruled with express reference to the peculiar legal system of Louisiana, and is not in conflict with the rule stated.

Tennessee having an origin common with that of the older states, and nothing appearing in the bill to destroy the presumption of the reign there of common law, we must apply it in determining this case.

By the common law, the husband was entitled during coverture to receive and to reduce to his possession and ownership all choses in action belonging to the wife at the time of marriage, or which may accrue to her while the coverture continues. As to what acts of the husband will amount to such reduction to his possession no rule ¹⁷¹ has been declared which will apply with precision to the varied transactions of that nature. That the husband may, during the coverture in the assertion of his marital rights and for a valuable consideration, assign the choses in action of the wife which are capable of being immediately reduced to possession so as to vest at least the beneficial ownership in the purchaser, the authorities are generally agreed: 2 *Kent's Commentaries*, 137-139, and notes; *Clancy on Husband and Wife*, 150; *Schuyler v. Hoyle*, 5 Johns. Ch. 196; *Needles v. Needles*, 7 Ohio St. 432, 70 Am. Dec. 85; *Caplinger v. Sullivan*, 37 Am. Dec. 575, and cases collected in note; *Siter's Appeal*, 4 Rawle, 467; *McConnell v. Wenrick*, 16 Pa. St. 365; *Webb's Appeal*, 21 Pa. St. 248; *Rice v. McReynolds*, 8 Lea, 36; *George v. Goldsby*, 23 Ala. 326.

Shares in the capital stock of a business corporation cannot be reduced to possession by collection as in the case of moneyed contracts, but, representing as they do intangible interests in the property of the corporation, they are classed as choses in action, and when belonging to the wife are subject to the husband's common-law power of appropriation, and this power he may exercise by assigning the shares for value: *Cummings v. Cummings*, 146 Mass. 501; *Rice v. McReynolds*, 8 Lea, 36. The last-named case is confirmatory of the presumption that as to such right of the husband the common-law rule was prevailing in Tennessee when these transactions were had.

Whether the pledge of Mrs. Johnson's stock in 1895 amounted to a reduction to the possession of her husband may become a question of fact depending largely upon whether his intention was to thereby finally appropriate the stock as his own. The bill avers substantially that such was his purpose and its sufficiency in that respect is not challenged by demurrer. No concurrence or act of transfer on the part of Mrs. Johnson was needed to perfect her husband's common-law right and power of appropriation. The transaction being in Tennessee, the statutes of Alabama relating to the disposition of the wife's property are without application to this case.

The decree of the chancery court will be affirmed at appellants' cost.

IT IS PRESUMED THAT THE COMMON LAW exists in a sister state: *Burdick v. Missouri Pac. Ry. Co.*, 123 Mo. 221, 45 Am. St. Rep. 528; *Peet v. Hatcher*, 112 Ala. 514, 57 Am. St. Rep. 45.

PERSONAL PROPERTY IS SUBJECT TO THE LAW of the owner's domicile: *Note to Consolidated etc. Co. v. Collier*, 39 Am. St. Rep. 186. A husband's right to his wife's movables is determined by the law of his domicile, if they have different domiciles, and by the law of the new domicile, if they change domiciles, as to property acquired after the change: *Kneeland v. Ensley*, Meigs, 620, 33 Am. Dec. 168.

A HUSBAND IS ENTITLED TO HIS WIFE'S CHOSES in action upon reducing them to possession, whether they belonged to her at the time of marriage or accrued to her during coverture: *Leakey v. Maupin*, 10 Mo. 868, 47 Am. Dec. 120; *Burleigh v. Coffin*, 22 N. H. 118, 53 Am. Dec. 236. See, too, *Botts v. Gooch*, 97 Mo. 88, 10 Am. St. Rep. 286.

AN ASSIGNMENT OF A WIFE'S CHOSES IN ACTION by her husband is effectual, if at the time of the assignment, or afterward during his lifetime, he is in condition to reduce them to possession: *Browning v. Headley*, 2 Rob. (Va.) 340, 40 Am. Dec. 755; monographic note to *Caplinger v. Sullivan*, 37 Am. Dec. 580.

ALABAMA MINERAL LAND COMPANY v. JACKSON.

[121 Alabama, 172.]

STATUTE OF FRAUDS—UNCERTAINTY OF DESCRIPTION.—Under the statute of frauds the written agreement or memorandum must describe the subject matter directly or by reference to something outside of the writing, by resorting to which certainty may be attained.

SPECIFIC PERFORMANCE—UNCERTAINTY OF CONTRACT.—A contract which is so uncertain in respect of its subject matter that it neither identifies the thing by describing it, nor furnishes any data by which certainty of identification can be attained, is void.

STATUTE OF FRAUDS—EFFECT OF CONTRACTS.—A contract falling under the influence of the statute of frauds, and not complying with its provisions, cannot be directly enforced, nor can damages be awarded for its violation.

STATUTE OF FRAUDS—ESTOPPEL TO ASSERT.—Although under a contract for the sale of land, it is the duty of one of the parties to remove the uncertainty of description of the subject matter by designating the specific lands to which it is to apply, he is not thereby estopped to deny the validity of the contract under the statute of frauds.

STATUTE OF FRAUDS.—AN AGREEMENT TO MAKE A CONTRACT for the sale of lands must itself comply with the statute of frauds in all essential respects, including a description of the land. Otherwise, the agreement is void, and cannot support either a bill for specific performance, or an action for damages.

STATUTE OF FRAUDS—CONTRACT TO PURCHASE TIMBER.—A written agreement by which one undertakes to sell and another to purchase the timber on a certain number of acres of land, to be selected by the purchaser, amounts to an agreement to make a contract for the sale of the land, and is, until such selection is made in writing, void under the statute of frauds.

S. D. Logan and J. J. Willett, for the appellant.

Gunter & Gunter, for the appellee.

¹⁷⁴ McCLELLAN, C. J. Writings were signed by the Alabama Mineral Land Company and E. E. Jackson, by which in terms the latter was to purchase from the former, at a stipulated price per acre, "the timber from a continuous block of ten thousand acres, consecutive sections, in a northwesterly line from Maplesville, townships 21 and 22," the purchaser to determine upon a continuous body of lands, mineral lands excepted, and to designate the same to seller on a day named. It was further stipulated that in "case of any material tract recently timbered having been cleared of said timber, or pillaged of same to any material extent, the seller will substitute other lands for cutting in its stead" at any time prior to a

stated date. The purchaser failed to determine upon and designate a body of lands, or the lands contemplated in the agreement, and failed to make the payments provided for in the writing. The action is prosecuted by the land company. The complaint claims forty-five thousand dollars damages for the breach of the alleged contract stated above, which is set out in the complaint; and the plaintiff, after averring that it had fully complied with all the provisions of said contract on its part, assigned the following breaches thereof on the part of the defendant: "1. That defendant failed to designate the lands on which he was to cut and remove the timber, and has failed to make payment for said timber as provided in said contract; 2. Defendant willfully refused to complete said contract by willfully refusing to designate said ten thousand acres from which the timber was to be cut; 3. Defendant has failed and refused to purchase the timber from said ten thousand acres as provided in said contract, and has failed and refused to pay for the same."

To this complaint the defendant pleaded, among other defenses, the statute of frauds for insufficient description of the land an interest in which was intended to be embraced in the contract. Plaintiff demurred to the ¹⁷⁵ pleas—7 and 9—setting up this defense, and its demurrers were overruled. This ruling presents the question of importance involved on this appeal.

Under the statute of frauds, the written agreement or memorandum must describe the subject matter directly or by reference to something outside of the writing by resorting to which certainty may be attained. It requires no discussion to demonstrate that the contract under consideration does not, either in itself or by reference, describe the land intended to be sold so as to admit of or to furnish means for its identification. To the contrary, the writing expressly refers the segregation and identification of the land to the selection of the purchasers within certain very uncertain limitations. There cannot, we think, be two opinions on the inquiry whether this writing, intended to evidence a sale and purchase of an interest in lands, fills the requirement of the statute of frauds. Manifestly, it does not. And we do not understand appellant's counsel to seriously insist that the writing bound the plaintiff to sell and the defendant to purchase any particular land, and it is admitted that the agreement could not be specifically enforced in equity. But it is insisted for appellant that while the land has not

been designated by the defendant, and while a court of chancery would not select the ten thousand acres contemplated by the contract for the defendant, Jackson, and force him to take them, yet the seller has a remedy in an action for a breach of the contract against Jackson, for that he failed and refused to determine upon and designate particular land as by the terms of the writing he was required to do, the theory being, in the first place, that the same certainty of description is not necessary in the contract for the purposes of an action at law for its breach as is required on a bill filed for its specific performance in equity, and, in the second place, that the defendant is estopped to say that the contract is void for uncertainty as to its subject matter, because, under the terms of the writing, it was his duty to remove that element of uncertainty by designating the particular land to be covered by the contract.

We cannot assent to either of these propositions. A contract which is so uncertain in respect of its subject ¹⁷⁶ matter that it neither identifies the thing by describing it nor furnishes any data by which certainty of identification can be attained is void as well at law as in equity and as incapable of supporting an action for damages as of supporting a bill for specific performance, upon proper objection taken. The infirmity of the contract here under consideration is that it not only does not attempt to describe the land, but expressly provides that the identity of the subject matter shall be fixed by acts in pais to be subsequently performed by the purchaser; and until such acts are performed, no court can for any purpose say that any certain land is embraced in the writing, and no court can give validity to it as a contract for the sale of any land either directly, by enforcing its specific performance, or indirectly, by awarding damages for its breach. It falls necessarily within the general rule that, while not absolutely void, but to be so held upon proper objection, a contract falling under the influence of the statute of frauds and not complying with its provisions will not be directly enforced nor will damages be awarded for its violation. The true view of this writing in its final analysis is this: The land company agrees to sell to Jackson, and Jackson agrees to buy from the company, a wholly uncertain part of its lands for a stated consideration. This undertaking, standing alone, is of no efficacy whatever as it does not identify the subject matter, and there results from the agreement so far stated no obligation on the part of the company to sell any land to Jackson and no obligation on Jackson

to buy any land from the company. The only further provision of the writing bearing on the matter we are considering is that by which Jackson agrees to determine upon and to designate to the company the particular ten thousand acres of its land he will purchase from the company, and the correlative undertaking of the company to sell him the particular acres he thus determines upon and designates. Clearly, these latter stipulations are of no effect toward supplying identification of the subject matter until they are complied with. So long as the particular lands are not determined upon by Jackson and designated by him to the company, the whole agreement remains at large as to the thing intended to be contracted ¹⁷⁷ about, the infirmity of the absence of identification still attaches to the writing, and it cannot be said that there is any contract to sell any land because there is no contract to sell any particular land. Had Jackson determined upon and designated the particular ten thousand acres to be sold and purchased, and evidenced such determination and designation by writing, the effect would have been to complete, or, to speak accurately, to make a contract for the sale of land where no contract before existed. The undertaking of Jackson to determine upon and designate lands was therefore, in substance and essentially, an agreement on his part to enter into a contract to purchase such lands as he might determine upon and designate. It was to all intents and purposes an agreement to make a contract for the sale and purchase of lands. And like the contract of sale, an agreement to make such contract must itself comply with the statute of frauds in all essential respects, including, of course a description of the land; else the agreement is void and will not support either a bill for performance or an action for damages: *Amburger v. Marvin*, 4 E. D. Smith, 393; *Dicken v. McKinley*, 163 Ill. 318, 54 Am. St. Rep. 471; *Raub v. Smith*, 61 Mich. 543, 1 Am. St. Rep. 619; *Wardell v. Williams*, 62 Mich. 50, 4 Am. St. Rep. 814; *Yates v. Martin*, 2 Pinn. 178; *Hayes v. Burkam*, 51 Ind. 130; *Smith v. Bowler*, 2 Diss. 153; *Pulse v. Hamer*, 8 Or. 251; *Ledford v. Ferrell*, 34 N. C. 285; *Martin v. Wharton*, 38 Ala. 637.

The undertaking is none the less a mere engagement to make a contract for the sale and purchase of land for that to perfect the contract under the statute of frauds requires only the selection and designation of the subject matter. This very thing is as essential to the contract under the statute as the expression of a consideration or the subscription of the party to be

charged; and it would scarcely be contended even that a writing containing every requisite except the expression of the consideration and, in lieu of such expression, an undertaking on the part of one of the parties to express the consideration therein subsequently, or in another writing, could be made the basis for awarding damages for a failure to execute such undertaking; or that a parol promise ¹⁷⁸ to subscribe a writing containing all essential stipulations and expressions could be actionable. That is what we have in this case, a parol promise; for, every requisite to the contract not being in writing, there is no written contract and the whole transaction lies in parol. It might as well be insisted that where the contract is entirely verbal, the party purchasing agreeing to pay a portion of the purchase money and take possession at once, and thus to validate the sale, an action would lie for his failure to thus perfect the contract by paying and taking possession, as to insist that an action will lie upon any stipulation of an agreement which for any reason is void under the statute of frauds.

It is argued for appellant "that the defendant, Jackson, cannot set up his own wrong in avoidance of the contract." The obvious vice of this position lies in its assumption that there ever was a contract between the parties. Of course, it is familiar law "that one who by his own fault has prevented the performance by the other party of the contract, or made performance impossible, cannot claim exemption from liability on the contract" and "that in the case of dependent promises, a plaintiff who has come short of fulfilling because the defendant prevented him, may maintain his action"; but these principles presuppose the existence of a contract between the parties, a legal, valid, binding, living contract, not a mere form of words without substance, not a mere expression of terms which on their face appear to set forth promises and obligations, but which, by reason of some positive rule of law operating upon the terms so expressed, in fact and in law bind nobody to do anything. If the writing under discussion could have been a contract without containing a description of the land, and the plaintiff had been prevented to carry out its part of the contract and to convey the land to the defendant by the latter's refusal to identify the land to be conveyed, in such case the doctrine contended for would obtain, plaintiff's failure to carry out its undertaking having been caused by defendant's own wrong, it would not affect its right to compensation for defendant's default. But this statement of the law manifestly assumes the very point in issue,

the existence of a contract, and defendant's ¹⁷⁹ wrongful prevention of the execution of its legally binding stipulations by the plaintiff. On the real case without assumptions, the case we have, the default of the defendant did not prevent the plaintiff carrying out an existing contract, but it prevented any contract coming into existence.

Appellant's counsel cite the case of *Lingeman v. Shirk*, 15 Ind. App. 432, as being directly in point to the support of his contention that this action lies on Jackson's undertaking to "determine upon and designate" to the land company the particular ten thousand acres of land to be embraced in the contract. This decision may be all that is claimed for it; but it is not supported by any authority, not even by the cases cited in it, and is, in our opinion, unsound and not to be followed.

These views fully dispose of the case on its merits against appellant and we do not understand counsel to desire the decision of other points appearing on the record.

Affirmed.

STATUTE OF FRAUDS.—THE WRITING relied upon, to meet the requirement of the statute, must contain, either on its face or by reference to other writings, a sufficiently clear and explicit description of the property to render it capable of being identified: *Kopp v. Reiter*, 146 Ill. 437, 87 Am. St. Rep. 156.

A CONTRACT VOID UNDER THE STATUTE OF FRAUDS cannot be used for any purpose: *Wardell v. Williams*, 62 Mich. 50, 4 Am. St. Rep. 814; *Raub v. Smith*, 61 Mich. 543, 1 Am. St. Rep. 612.

STATUTE OF FRAUDS.—A SALE OF GROWING TIMBER, to be presently cut and removed from the land, is within the statute of frauds: *Hirth v. Graham*, 50 Ohio St. 57, 40 Am. St. Rep. 641.

SPECIFIC PERFORMANCE—DESCRIPTION OF SUBJECT MATTER.—Specific performance of a contract to convey land will be decreed only when the description of the subject matter is so certain that it may be shown therefrom what the vendee was contracting for and the vendor selling: *Hamilton v. Harvey*, 121 Ill. 400, 2 Am. St. Rep. 118. But it is not necessary that the description should be given with such particularity as to make a resort to extrinsic evidence unnecessary: *Bacon v. Lemle*, 50 Kan. 494, 24 Am. St. Rep. 134.

ALABAMA MIDLAND RAILWAY COMPANY v. MCGILL.

[121 Alabama, 230.]

RAILROADS—NEGLIGENCE IN RUNNING TRAINS AT NIGHT.—It is negligence in a railroad company to run its trains in the night-time at such rate of speed that it is impossible, by the use of ordinary means and appliances, to stop the train within the distance in which stock upon the track can be seen by the aid of the headlight on the engine. If injury results from such negligence, the company is liable to the owner of the stock killed or injured.

RAILROADS—NEGLIGENCE.—If anything in surrounding conditions and circumstances suggests an increase of care in the operation of a railroad train to avoid peril and damage, the duty to increase such care proportionately increases.

A. A. Wiley, for the appellant.

O. C. Doster, for the appellee.

231 HARALSON, J. Action against a railroad company for negligence in killing stock.

1. The principle is too well established to be longer questioned in this court that it is negligence in a railroad company to run its trains in the night-time at such a rate of speed that it is impossible, by the use of ordinary means and appliances, to stop the train within the distance in which the stock upon the track can be seen by the aid of the headlight on the engine and prevent injuring them, and, if injury results from such negligence, the railroad company is liable to the owner thereof: **232 Louisville etc. R. R. Co. v. Kelton, 112 Ala. 533,** and our cases there cited.

2. The engineer testified that he was running, at the time of the accident, forty-five or fifty miles an hour, which was his usual speed; that it was about 10 o'clock P. M. when it occurred; the night was very dark and foggy; that he was keeping a sharp lookout; that the road is straight for about three hundred yards west of the trestle where the animals were killed, and there was a wall of fog at that point which prevented his seeing anything more than forty yards ahead of his train; that on an ordinary night, he could have seen one hundred yards ahead of him, and, after doing all he could, it was impossible to stop the train after discovering the animals before he ran on them. He also testified that the road ran down Claybank creek for several miles and that the fog was all along through the swamp of the creek, and at the particular point where the mule and horse were killed there was a dense wall of fog which

prevented his seeing for more than forty yards ahead of him. It was also shown that the track at this point, the way the train ran, was down grade.

3. On these facts, counsel for defendant seek to have this case taken from the rule laid down in the cases referred to above, on what was said in *Central R. R. etc. Co. v. Ingram*, 98 Ala. 399, that "if the injury is not attributed to the rate of speed, in view of the ordinary darkness of the night, but resulted from the unusual natural causes, such as fog, or falling rain or snow, those in charge of the train being, in all other respects in the exercise of due care, the injury would be excused." But the defendant is not relieved from liability from anything said in that case as applicable to the facts here. It is a well-settled and just principle, that where anything in the surrounding conditions and circumstances suggests care in the operation of a railroad train to avoid peril and damages to others, the higher the duty increases to observe it: *Birmingham etc. R. R. Co. v. Harris*, 98 Ala. 334. Here, as the undisputed facts show, the train was being run at its usual speed of forty-five or fifty miles an hour; that it was a dark and foggy night, and the fog was all along through Claybank swamp through which the train was ²³³ running, up to the point of the accident, without any slow-up, notwithstanding the fact that the engineer could not see animals ahead of him more than forty yards. It was not shown that the fog was denser or more impenetrable at the point of accident than along the road for miles before the accident occurred. The fact stated by the engineer, that at that particular point there was a dense wall of fog which prevented his seeing more than forty yards ahead of him, does not establish its prevalence at that point in a denser form than at other places. Common prudence would have suggested the duty on the part of the engineer to run his train at a rate of speed, and to have his train under such control, as to stop it within the distance his headlight would reveal an object on the track ahead of him the size of a horse or mule. Instead of this, he plunged along at this very great and apparently reckless rate of speed, as though the conditions were not unusual. Peril to the train itself, the passengers on it, the stock that might be on the track was thereby necessarily, and for aught appearing, very greatly enhanced. Moreover, the engineer testified that his train was a very heavy one, consisting of five or six coaches—a mail-car, two passenger and an express-car and one or two sleepers. It was not shown that the train could have

been stopped within a hundred yards, the distance the engineer testified he could have seen ahead of him on an ordinary night by the aid of the headlight. It thus appears that, independent of the fog, and if it had been a clear night, he might not have been able to save the animals, and was, as for the animals on the track, guilty of negligence in running the train. The court did not err in giving the general charge for plaintiff, and refusing the like charge in favor of the defendant.

Affirmed.

IN THE CASE of Louisville etc. R. R. Co. v. Kelton, 112 Ala. 536, Mr. Justice Head, in delivering the opinion of the court, said: "In Central R. R. etc. Co. v. Ingram, 98 Ala. 395, following the former cases of Memphis etc. R. R. Co. v. Lyon, 62 Ala. 71, and Alabama etc. R. R. Co. v. Jones, 71 Ala. 487, we ruled that a railroad company injuring stock by the running of its trains in the night-time at such rapid rate of speed that it is impossible, by the use of ordinary means and appliances, to stop the train and prevent the injury within the distance in which the stock upon the track could be seen by the aid of the headlight, was guilty of negligence, which, if it caused the injury, entitled the owner to recover. That decision has been followed in several cases: Louisville etc. R. R. Co. v. Gentry, 103 Ala. 635; Louisville etc. R. R. Co. v. Davis, 103 Ala. 661; Louisville etc. R. R. Co. v. Cochran, 105 Ala. 354; Birmingham etc. R. R. Co. v. Harris, 98 Ala. 326. We are now asked to reconsider and change that ruling. We have again considered it, and perceive the force of the elaborate and able argument of appellant's counsel, but we are satisfied that the rule declared is right and decline to disturb it."

Notwithstanding that the rule declared in the principal case is the unalterable doctrine of the supreme court of Alabama, it does not prevail in other states. Thus, in Louisville etc. R. R. Co. v. Milam, 9 Lea, 223, Mr. Justice Freeman, delivering the opinion of the court, said that "it was error to charge that if a train was running at such a speed that it could not be stopped within the distance that the headlight would discover objects upon the railroad the jury might find the company guilty of negligence and recklessness in killing the animals sued for, notwithstanding all the prescribed precautions were observed. There is no law prescribing the rate of speed at which trains should run. The question of recklessness, or excessive speed, is one to be determined by all the facts and circumstances at the time, and not by the arbitrary rule suggested as to the distance an obstruction could be seen by aid of the headlight." In Illinois Cent. R. R. Co. v. Greaves, 75 Miss. 362, Mr. Chief Justice Woods said: "The third instruction for the plaintiff was inapplicable to the developed facts of the case, and was erroneous. Under the circumstances attendant upon the killing of the horses, as shown by the evidence, it was not the duty of the agents of the company to drive the animals from the track, a feat palpably impossible of accomplishment. In proper cases, where the facts proven show that the danger was seen in time to have avoided doing injury, if reasonable care and skill had been exercised by the railroad's agents and servants operating and controlling the train, the charge would be correct, but it was wholly erroneous and misleading with the jury in this case, where the uncontroverted evidence is that the train was running about fifty

miles an hour on a dark night, and the animals only seen about one hundred and fifty feet in front of the locomotive by the engineer, who was on his seat and on the lookout for obstructions on the track." Among the Alabama cases cited above is that of *Memphis etc. R. R. Co. v. Lyon*, 62 Ala. 71, where it appeared that an injury to an animal on a straight track occurred at night, and that with the perfect headlight then being used, the engineer could not see the animal at a greater distance than thirty yards. At the speed that the train was running it was impossible to stop within a less distance than forty yards. It was held upon these facts that the railroad company was guilty of negligence as matter of law. In *Blankenship v. Kanawha etc. Ry. Co.*, 43 W. Va. 135, it appears from the case that on a light moonlight night a passenger train of cars was coming at the usual rate of speed on a clear straight track, where a mule upon the track could be seen two hundred and fifty yards or more. Such mule got upon the track far enough in front of the engine to walk along the track in the direction the train was going some forty feet before the engine overtook and killed it, the engineer failing to ring the bell or blow the whistle or do anything to prevent the accident if possible, and it was held that proof of such facts tended to prove negligence on the part of the railroad company, and, unless rebutted, was sufficient to support a verdict for the plaintiff.

In *Sandham v. Chicago etc. R. R. Co.*, 38 Iowa, 88, it was held that railroad companies are compelled to exercise only ordinary care to avoid injury to livestock, while they are bound to exercise extraordinary care to protect passengers. Hence, a railroad company need not diminish the speed of its passenger trains to avoid injuring animals on the track, if by so doing it augments the danger to passengers. If a train is moving at a greater rate of speed than is allowed by law, either at day or night, the railroad company is liable for killing or injuring stock upon its track: *Houston etc. R. R. Co. v. Terry*, 42 Tex. 451.

HANOVER FIRE INSURANCE COMPANY v. CRAWFORD.

[121 Alabama, 258.]

INSURANCE—CONDITION SUBSEQUENT—CONSTRUCTION.—If a policy of fire insurance covers several items, and there is a breach of a condition subsequent as to one of them, it does not necessarily follow that the policy is avoided as to all. The nature and character of the condition and the purpose to be accomplished, as well as the equity of the case, are to be considered. If nothing but injustice can be accomplished by the enforcement of such condition, it cannot be presumed that the parties contracted with that intention as to that particular item insured.

INSURANCE—CONDITION SUBSEQUENT.—A provision in an insurance policy that the insured shall take an inventory of the goods insured at stated times, and keep his books and such inventory in an iron safe, or in some place not exposed to fire likely to destroy the building insured, and that a failure to observe this condition avoids the policy, imposes a condition subsequent.

INSURANCE—SEVERABLE CONDITIONS.—If a policy of fire insurance is issued on a store building, stock of merchandise, and store and office furniture and fixtures, in separate and distinct sums, and provides that the insured shall take an inventory of stock at stated times, and keep his books and such inventory in an iron safe, or in some place not exposed to fire likely to destroy the building insured, and that a failure to observe this condition shall avoid the policy, such condition does not apply to the building and fixtures so that a breach of it defeats a recovery for their loss, in case the whole of the property is destroyed by fire.

T. H. Watta, for the plaintiff and appellant.

Tompkins & Troy, for the defendant, also appellant.

²⁰⁰ **McCLELLAN, C. J.** The plaintiff in the court below brought suit against the defendant upon a policy of insurance, in which he was allowed to recover the value of the storehouse and fixtures therein, two of the subjects covered by the policy, and not permitted to recover the value of the stock of goods kept in the house, on account of his failure to comply with that provision of the policy known as the iron-safe clause. Both plaintiff and defendant prosecute appeals to this court from the judgment.

The defendant's assignments of error are determinable upon the decision of the question as to whether the policy with respect to the three subjects of insurance, to wit, the house, the fixtures, and the goods, is divisible so as to allow the plaintiff to recover the value of the house and fixtures, notwithstanding his admitted breach of that condition of the policy above referred to and designated as the "iron-safe clause."

The policy is one contract containing many conditions, warranties, and representations. It recites a gross premium paid for the consideration of indemnifying the plaintiff against loss or damage by fire to an amount not exceeding seventeen hundred and fifty dollars to the following described property: seven hundred dollars on two-story shingle roof building, etc., while occupied as a general store, etc.; one thousand dollars on his stock of merchandise, consisting of drygoods, groceries, hardware, etc., while contained in said building; fifty dollars on store and office furniture and fixtures, etc., contained in said building.

It does not necessarily follow that because all the items insured are covered by one policy, that a breach of a condition subsequent in the policy will avoid it as to all the items or subjects covered. And, indeed, it ²⁰¹ does not necessarily follow that because there are many items or subjects insured by the

policy that it may not be avoided as to all of them. Whether either of these results flow from a breach of a condition in a policy must depend upon the nature and character of the condition and the purpose to be accomplished. They are usually adopted by insurance companies to protect themselves against fraud, and they have been recognized and enforced by the courts as valid stipulations whenever they are reasonable. Whenever nothing but injustice will be accomplished by the enforcement of a condition, the courts cannot presume that it was the intention of the parties to have so contracted as to that particular item of property insured. The law will be guided by a respect to general convenience and equity and by the good sense and reasonableness of the particular case, for it must be supposed that it was the intention of the parties that such construction should take place. In the case of Georgia Home Ins. Co. v. Allen, 119 Ala. 436, this court held the iron-safe clause to be a condition subsequent. This covenant and promissory warranty imposed upon the insured the duty to take a complete itemized inventory of his stock of goods within thirty days of the issuance of the policy, unless such inventory had been taken within twelve months prior to the date of its issuance and, at all events, to take this inventory at least every twelve months from the time of the taking of the last one. It also exacted of him that he keep a set of books which shall clearly and plainly present a complete record of business transacted, including all purchases, sales, and shipments, both for cash and credit, from date of inventory and during the continuance of the policy. He was required to keep these books and inventory and also the last preceding inventory, if such has been taken, securely locked in a fire-proof safe at night, and at all times when the building mentioned in the policy is not actually open for business, or, failing in this, the assured will keep his books and inventories in some place not exposed to a fire which will destroy the storehouse. It is further provided that in the event ~~was~~ of his failure to produce his books and inventories for the inspection of the defendant company that the policy shall become null and void, etc. The purpose of incorporating this condition in the policy is patent from its language. That it was never within the contemplation of the parties that the books or inventory were to contain any item with reference to the building or fixtures is beyond cavil. The preservation of them was solely and exclusively for the purpose of ascertaining the value of the stock of goods covered by the policy in case of

fire. They were the best evidence of this fact, and, if correctly kept, would furnish an unerring guide by which the amount of defendant's liability as to the goods destroyed could have been ascertained. Besides, they stood as a barrier to the perpetration of any fraud by the assured with respect to the quantum and value of the goods destroyed. No such considerations could be invoked as to the application of this condition to the other subjects of insurance in the policy.

Nor can it be fairly said that this condition entered into the inducement on the part of the defendant to issue the policy. It was not shown that the rate of insurance upon the house and fixtures would have been greater had the assured not included his stock of goods in the policy, or that a different rate was charged upon the separate valuation of each subject. Furthermore, we are unable to see how a failure to comply with the condition could possibly affect the risk upon the building and fixtures. If broken by the assured and a loss occurs by fire, the assured loses the value of his goods, and this, too, whether the fire is occasioned by his willfulness, neglect, accident, or the incendiarism of another. There could then be no inducement for him to destroy the building, or the building and its contents—unlike the case, in this respect, where there is a misrepresentation as to ownership of a building containing machinery more or less attached to the building, and both the building and machinery are the subjects of insurance in the same policy. Here, we can well see how the hazard or risk upon the machinery would be increased if there was a false warranty as to the ownership of the building. ²⁶³ The assured might be induced, if allowed to recover for loss of machinery notwithstanding his false warranty which would deprive of the right to recover for the loss of the house, to destroy the house for the purpose of getting the insurance upon the machinery.

We are aware that in many of the states it is held that a policy like the present one is an entire contract, and a false warranty will avoid the entire policy. In others the rule is different, and, unless the false warranty is of such a nature as to increase the hazard or risk assumed by the insurance company as to all the subjects separately valued, the assured is allowed to recover for the loss or destruction by fire of those not falling under the influence of this construction. This latter rule is declared by the courts, holding it to be the fairer one and more clearly carrying out the intention of the parties to the contract.

Whatever may be the rule as to the effect of false warranties,

we are clearly of the opinion that the condition under consideration, as to its application, cannot, by any rule of construction consonant with justice and reason and the manifest intention of the parties, be made to so apply to the building and fixtures as that a breach of it would defeat his recovery for their loss.

In the case of *Manchester Fire Assur. Co. v. Feibelman*, 118 Ala. 308, the policy of insurance contained separate valuations made of the fixtures, wines, liquors, etc., and the pool tables of the assured. The company insisted that the assured had avoided the policy entirely by giving a mortgage upon three of the pool tables in violation of one of the conditions contained in the policy. This court held that the insurance as to each of the subjects was divisible and that the assured might recover for the loss of the other items, notwithstanding he had avoided the policy as to the pool tables. In support of this view, in addition to the authorities therein cited, we find that in *Clark v. New England Mut. Fire Ins. Co.*, 6 Cush. 342, 53 Am. Dec. 44, the supreme court of Massachusetts held that the alienation by the assured of his shop, after the issuance of the policy, did not avoid the policy upon his tavern covered by the same policy, they each being separately valued; also that in *Speagle v. Dwelling House Ins. Co.*, 97 Ky. 646, the supreme court of Kentucky held that where four dwelling-houses insured were burned, the fact that two of them were unoccupied, thus vitiating the policy as to them, does not prevent recovery for the other two, which were occupied.

The case of *Mitchell v. Mississippi Home Ins. Co.*, 73 Miss. 53, 48 Am. St. Rep. 535, decided by the supreme court of Mississippi is directly in point. The court said: "The requirement of the iron-safe clause is that the last inventory and the books of account of sales and purchases shall be kept in such safe or in some secure place other than the premises where the insured property was kept, and that a failure to produce the inventory and books after loss shall avoid the policy; but all this has reference only to such articles of merchandise as constitute the stock in trade. The store fixtures and furniture and the restaurant furniture, including the cooking stove, were never designed to be embraced in the inventory of the stock on hand or to be entered and carried in the books of account, showing purchases and sales of goods by the insured. As to these, the policy was not avoided by appellant's failure to observe the iron-safe clause. The contract was divisible, and it may be true that appellant could be defeated of a recovery for the sum

for which the stock of goods was insured, and yet might have been entitled to recover for the furniture and fixtures of the store and restaurant. The case is not to be confounded with those in which any recovery for any part of the sum insured has been denied because of misrepresentations or fraud of the insured." The evidence was without dispute that the plaintiff allowed his books to remain in the building in which he carried on the business of general merchandise, and that they were destroyed by the fire which destroyed the building, fixtures, and stock of general merchandise. That he avoided the policy as to the stock of merchandise by so doing is not questioned by him, and he is not entitled to recover for their loss, unless the defendant waived his breach of the ²⁶⁵ condition. It is insisted, however, by plaintiff that the evidence shows a waiver. The evidence relied upon as establishing this contention is in certain letters written by the agent of defendant to the plaintiff and his principal, and letters written by defendant to this agent with reference to the loss under the policy sued upon. In none of them do we find any recognition by the defendant or its agent of any liability to the plaintiff; but on the contrary there is in many of them a denial of all liability. In the only two letters received by plaintiff the liability of the defendant is expressly denied for the reason therein stated, that he had failed to comply with this condition of the policy. The evidence upon this point, in our opinion, was not as forceful as it was in the case of Georgia Home Ins. Co. v. Allen, 119 Ala. 436, in which this court held, as a matter of law, there was no waiver of the breach of the conditions and covenants of the policy.

What we have said renders it unnecessary to consider the rulings upon the pleadings in the cause. The evidence being without dispute upon the two propositions discussed by us, there was no error committed by the trial court of which the plaintiff or defendant can complain.

Judgment affirmed on each appeal.

INSURANCE, FIRE—IRON-SAFE CLAUSE.—In a policy of insurance covering a stock of goods, as well as store fixtures and furniture separately valued, an iron-safe clause requiring the books of account and the last inventory of the business to be kept in a fire-proof safe does not apply to the furniture and fixtures. The contract of insurance is good as to the furniture and fixtures, though it may be avoided as to the goods by a failure to observe such clause: *Mitchell v. Mississippi Home Ins. Co.*, 72 Wis. 58, 48 Am. St. Rep. 535.

BROADDUS v. SMITH.

[121 Alabama, 335.]

FIXTURES—WHAT ARE NOT.—If the owner of real estate, either orally or by writing, contracts or agrees with his tenant that he may erect or affix anything on the realty, and that the thing affixed shall remain his tenant's and be removed by him, such article never becomes a fixture, but remains the personal property of the tenant, and may be removed by him.

EXECUTIONS.—PERSONALTY AFFIXED TO REALTY. Under a contract with the owner of the land that it shall remain the property of the person affixing it, is subject to execution against him, and may be the subject of conversion. An execution purchaser is not deprived of his right in it, or his right of action for conversion, by delay in asserting such right, short of the statutory bar.

MORTGAGES.—PERSONALTY ATTACHED TO REALTY. A prior mortgagee acquires no interest in chattels attached to realty under a contract between mortgagor and tenant that the property so attached shall remain the property of the tenant attaching it, subject to the limitation that the mortgagor and tenant cannot by their acts do anything to impair the mortgagee's security.

EXECUTIONS.—PAROL EVIDENCE TO IDENTIFY LEVY. Parol evidence is admissible to identify vault doors and iron partitions as being the same property described in the sheriff's return on an execution as "two doors and frames."

J. T. Ashcraft, for the appellant.

Simpson & Jones, for the appellee.

335 DOWDELL, J. Under the undisputed evidence in this case, the question of fixtures vel non, depending merely upon the intention of parties as implied from the nature and purpose of the article affixed to the realty, or from the conduct of the parties before and subsequent to affixing, does not arise. Nor is there any question of intervening rights of innocent third parties. The evidence without conflict shows that there was an express agreement or contract between Reeder, the lessor and owner of the building, and the Alabama Banking and Trust Company, the lessee, that Reeder would construct a brick vault inside the leased building, and the banking company would furnish the two vault doors and iron partition, the property for the conversion of which this suit is brought, and that the said doors and partition should remain the property of the banking company, with the right of removal at the termination of the lease. This contract was oral, but being made with reference to personal property, was not offensive to the statute of frauds: *Harris v. Powers*, 57 Ala. 139; *Foster v. Mabe*, 4 Ala. 402, 37 Am. Dec. 749.

By express contract between the parties the nature and status of the chattel as personal property was preserved and retained. That it was competent for the parties to contract to this end we think there can be no doubt. Nothing, perhaps, could be considered in its character more permanent, and more of a fixture, and as forming a part of the realty, than a house or building erected on the land, and yet a house may by contract of parties become a chattel with right of removal: See *Harris v. Powers*, 57 Ala. 139; *Foster v. Mabe*, 4 Ala. 402, 37 Am. Dec. 749; also, *Powers v. Harris*, 68 Ala. 410. There is no evidence in ~~the~~ this case that the removal of the vault doors and iron partition would have effected any injury or damage to the building so as to impair the security of Wheelock's mortgage, which was taken upon the building prior to the construction of the vault within the building.

The vault doors and iron partition remaining personal property by the terms of agreement between Reeder and the banking company were subject to levy and sale under execution against the banking company with the right of removal in the purchaser at execution sale, upon the termination of the lease. While a party entering to remove after a reasonable time may be guilty of a technical trespass, yet his delay short of the statutory bar will not deprive him of his property right, or right of action for a conversion: *Dame v. Dame*, 38 N. H. 429, 75 Am. Dec. 195; *Hoit v. Stratton Mills*, 54 N. H. 109, 20 Am. Rep. 119; *Davis v. Emery*, 61 Me. 140, 14 Am. Rep. 553.

The following propositions seem to be supported by the weight of authorities in well-considered cases: 1. Where the owner of real estate contracts or agrees with a tenant that the tenant may erect or affix anything on the realty, and that the thing so affixed shall remain the property of the tenant and be removed by him, that such article never becomes a fixture, but remains personal property and the property of the tenant, and may be removed by him, just as any other article of personal property left by him on the land unattached to the realty; 2. Such contract or agreement may be either oral or in writing; 3. Such property, being personal property, is subject to execution against the tenant the same as any other personal property of the tenant, and may likewise be the subject of conversion; 4. A prior mortgagee of the real estate acquires no interest in the chattel attached, subject, however, to the limitations that the mortgagor and tenant may not by their acts do anything to impair the mortgagee's security: *Foster v. Mabe*, 4 Ala. 402, 37

Am. Dec. 749; Harris v. Powers, 57 Ala. 139; Powers v. Harris, 68 Ala. 410; Chalifoux v. Potter, 113 Ala. 215; Ewell on Fixtures, 66-68; 8 Am. & Eng. Ency. of Law, 45, 61; Mott v. Palmer, 1 ^{2d} N. Y. 564; Stout v. Stoppel, 30 Minn. 56; Manwaring v. Jenison, 61 Mich. 117; Tift v. Horton, 53 N. Y. 377, 13 Am. Rep. 537; Lake Superior etc. Ry. Co. v. McCann, 86 Mich. 106.

It was competent to offer parol evidence for the purpose of identifying the two vault doors and iron partition as being the same property described in the sheriff's return on the execution as "two doors and frames." This was not showing a levy by parol, but simply identifying the property contained in the levy: De Loach v. Robbins, 102 Ala. 288, 48 Am. St. Rep. 46; Webb v. Bumpass, 9 Port. 201, 33 Am. Dec. 310; Swan v. Parker, 7 Yerg. 490, 27 Am. Dec. 522, note 524.

The case was tried by the court without a jury, and the judgment rendered was for one hundred and thirty-eight dollars. The estimates of valuation on the property by the testimony ranged from one hundred dollars to one hundred and fifty dollars. The judgment was not unwarranted by the proof.

Entertaining the views above expressed we find no reversible error in the record, and the judgment of the circuit court must be affirmed.

FIXTURES—AGREEMENT AS TO.—It is competent for parties to agree that buildings shall remain the personal property of him who erects them, and such agreement may be expressed or implied: Merchants' Nat. Bank v. Stanton, 55 Minn. 211, 43 Am. St. Rep. 491. An agreement between a lessor and a lessee that a building on the leased premises shall remain the personal property of the lessee need not be in writing: Ryder v. Faxon, 171 Mass. 206, 68 Am. St. Rep. 417.

FIXTURES.—WHEN A TENANT MAY REMOVE fixtures is the subject of the monographic note to Holmes v. Tremper, 11 Am. Dec. 241-244.

FIXTURES—PRIOR MORTGAGE.—The old rule that all fixtures annexed subsequently to the execution of a mortgage, whether by the mortgagor or by his tenant or licensee, became as to the mortgagee a part of the realty, is repudiated as inapplicable in states where a mortgage is a mere security, conveying neither title nor right to possession: Merchants' Nat. Bank v. Stanton, 55 Minn. 211, 43 Am. St. Rep. 491.

BREWER v. ATKEISON.

[121 Alabama, 410.]

MORTGAGES.—THE TRANSFER OF ONE OF SEVERAL NOTES secured by mortgage clothes the transferee with the right to be first paid out of the mortgaged property, operates as an assignment pro tanto of the mortgage lien, and authorizes the transferee to foreclose such note under the power in the mortgage.

MORTGAGES—PARTIAL ASSIGNMENT.—If a mortgagee transfers one of the mortgage notes, and the mortgagor subsequently pays the remaining mortgage notes and takes a quitclaim deed to the land mortgaged, such transferee of such note cannot maintain an action at law against the mortgagee for money received to his use. His mortgage lien, to the extent of his note, is not affected, and he may foreclose it against the land.

J. W. McAlpine, for the appellant.

R. H. and N. R. Clarke, for the appellee.

⁴¹² HARALSON, J. Action for money had and received, tried on pleas of the general issue, and a special plea of estoppel.

The principle is well understood with us that the transfer of one of several notes secured by mortgage clothes the transferee with the right to be first paid out of the mortgaged property: *Knight v. Ray*, 75 Ala. 383; *Preston v. Ellington*, 74 Ala. 133. In the first case cited, the mortgagee, Knight, held three notes secured by mortgage, one of which, for a valuable consideration, he transferred to Ray, retaining the other two. The mortgagor made partial payments to Knight, the mortgagee, but left unpaid on his notes four hundred dollars. Thereupon, Knight, after due advertisement, sold the lands under the power in the mortgage, and, through another, became the purchaser of them at three hundred and fifty dollars, a sum in excess of the amount due Ray on his note. No money was paid, but the mortgagee entered a credit on the mortgage of the sum realized on the sale. Ray filed a bill, and sought thereby to trace her money into this land and to charge it with its reimbursement. The court held that the sale under the mortgage was, in effect, an investment by Knight, the mortgagee, of the funds realized from the sale, in the lands sought to be subjected by the bill. They said of the transaction: "While all the notes remained the property of Knight, the mortgaged lands were equally bound for the payment of each. When, however, Knight traded and transferred one of the notes to Mrs. Ray, retaining the others, although the transfer was by mere delivery, he clothed

her with the right to be first paid out of the proceeds of the property mortgaged: *Doe ex dem. McLoskey*, 1 Ala. 708; *Cullum v. Erwin*, 4 Ala. 452; *Wallace v. Nichols*, 56 Ala. 321. When Knight made the sale, the proceeds of right being primarily due to Mrs. Ray, it was his duty to pay, first, her demand, before applying any of the proceeds to his claim. Failing to do so, an action for money had and received lay in her favor; and when, instead of paying the money to her, he invested it in lands, he armed her with the right to have a lien declared on the land thus purchased for the payment to her of her money thus improperly invested."

¶ The principle underlying this and our other decisions to the same effect is, that an assignment by the mortgagee of one of the mortgage notes operates as an assignment *pro tanto* of the lien upon the lands, and entitles the assignee to payment in priority of the note retained by the mortgagee out of the funds arising out of the mortgaged property—the lien extending through the property mortgaged to the money for which it may have been sold. But the principle has no application to money paid by the mortgagor to the mortgagee on the remaining note, when, so to speak, the money so paid never saw the mortgaged lands, was independent and not the legitimate offspring of them. Such money could in nowise be imbued or infected with the mortgage lien security: Code 1844, sec. 1040; *Knight v. Ray*, 75 Ala. 383; *Preston v. Ellington*, 74 Ala. 133.

The evidence in the case shows, without conflict, that the money paid by Goodwin, the mortgagor, to the defendant, was not the proceeds of the sale of the mortgaged property, and that the property was not turned over to her on account of such payment.

The contention of appellee's counsel is—to express it in their own language—that "the payment by Goodwin, the mortgagor, of two of the three notes secured by the mortgage, and securing thereby a full satisfaction from the mortgagee of the mortgage debt and a reconveyance by the mortgagee of the legal title standing in her to the lands covered by the mortgage, we submit, was in effect a foreclosure of the mortgage, and entitled the appellee to his action for money had and received."

But in this insistence we apprehend counsel are in error. We have seen that the assignment by the mortgagee of one of the secured notes operated as an assignment *pro tanto* of the mortgage lien upon the lands, authorizing the assignee to foreclose the same under the power in the mortgage: Code, sec.

1040; *Hartley v. Matthews*, 96 Ala. 224. Goodwin, the mortgagor, knew when he paid the two notes to the defendant—the executrix of the mortgage—that there was another mortgage note outstanding, in the hands of the plaintiff, who claimed the same. When the defendants, therefore, upon the payment to her of the two notes she held executed ⁴¹⁴ to the mortgagor a quitclaim to the mortgaged lands, she did not thereby destroy the mortgaged security the plaintiff held on these lands for the payment of his debt. She was without authority to satisfy the mortgage as to plaintiff's debt, and, between the plaintiff and the mortgagor, the mortgage remains, as for anything appearing to the contrary, a valid security for the payment of the note held by the plaintiff, if, and to the extent, the same remains unpaid: 1 *Jones on Mortgages*, secs. 814, 818; *Wildsmith v. Tracy*, 80 Ala. 258; *Johnson v. Beard*, 93 Ala. 96.

From the foregoing it will appear that under the plea of the general issue, charges 1 and 2, requested by defendant and refused, should have been given.

Reversed and remanded.

MORTGAGES.—THE ASSIGNMENT OF ONE OF SEVERAL NOTES secured by a mortgage is an assignment pro tanto of the mortgage, and all the notes share pro rata in the distribution of the fund upon foreclosure: *State Bank v. Mathews*, 45 Neb. 659, 50 Am. St. Rep. 565; *Cram v. Cotrell*, 48 Neb. 646, 58 Am. St. Rep. 714. See, too, *Miller v. Rutland etc. R. R. Co.*, 40 Vt. 399, 94 Am. Dec. 413; *Jennings v. Moore*, 83 Mich. 231, 21 Am. St. Rep. 601.

MORTGAGES.—PRIORITY BETWEEN ASSIGNEES of several notes secured by one mortgage is treated in the note to *Parker v. Mercer*, 38 Am. Dec. 440, 441. See, too, *Gordon v. Hazzard*, 32 S. C. 351, 17 Am. St. Rep. 857.

SOUTHERN RAILWAY COMPANY v. SHIELDS.

[121 Alabama, 460.]

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE.—If a railroad employé is ordered by the superintendent to stop a moving car in an unusual and dangerous way, and the employé makes an attempt to stop it and is injured thereby, he is not, as matter of law, guilty of contributory negligence, if he has been in the service only a month, has never seen an attempt made to stop a car under such circumstances, and the attempt did not, to his inexperience, involve obvious danger or risks which a prudent man would not incur. He had the right to rely, to some extent, on the greater knowledge and experience of his superintendent, and upon the assumption that the latter would not expose him to unnecessary peril.

Smith & Weatherly, for the appellant.

J. T. Shougart and Lane & White, for the appellee.

⁴⁶¹ McCLELLAN, C. J. This action was instituted by William C. Savage against the Southern Railway Company. There ⁴⁶² was judgment for plaintiff below, and the defendant appealed. Savage subsequently died, and the cause has been revived here in the name of Shields, the administrator of his estate.

The complaint contained thirty-three counts. A number of these were held bad on demurrer, and the affirmative charge for defendant was given on all the rest except the fourth and sixth. Each of the counts thus left in the case was intended to present a case under the second subdivision of section 2590 of the code of 1886, as for an injury caused by the negligence of an employé of the defendant who had superintendence intrusted to him, whilst in the exercise of such superintendence. There was a demurrer to each of these counts as amended, which was overruled. The only objection made by the demurrer which is insisted on here is that the counts do not show superintendence, and negligence producing the injury whilst in its exercise. The counts are not open to this objection. They do show that one Rhyne had superintendence intrusted to him in respect of a part of the crew and certain operations of a pile driver, that plaintiff, Savage, belonged to that part of the crew, and that the injury was received by him while engaged in an operation of the pile driver of which Rhyne had charge and superintendence and in respect of which it is alleged that Rhyne gave plaintiff a negligent order, in the execution of which he received the injuries complained of. The demurrers were properly overruled.

The evidence shows that plaintiff was injured while endeavoring, in obedience to an order given him by Rhyne, to stop or scotch the car carrying the pile driver by inserting the beveled end of a crowbar on the rail in front of a wheel of the car. The attendant circumstances were these: The car with the pile driving outfit upon it was on a trestle which was about fifteen feet high. The track was down grade from the car to the end of the trestle, about seventy-five feet, and beyond. Piles were to be driven into the ground at particular places beneath the trestle. The car had stopped four or five feet short of the particular place where the first pile was to be driven. The piles to be used were lying on the ⁴⁶³ ground in front of the

car. It was necessary to hoist the piles and place them in a position in the leads of the pile driver to be driven into the ground. On the car as a part of the pile driving apparatus was a steam-engine which operated a drum. The piles were to be hoisted by attaching lines or cables to them, passing the lines through a pulley at the top of the leads, and on to this drum to which they were attached, so that they would be drawn in by its revolutions. The car had, as we have indicated, to be moved forward four or five feet to be in the position required to drive the pile. There were at the time no appliances on the car itself either to move it or to stop it once in motion. There were two possible ways of getting it forward on this occasion to the desired point and stopping it there. One was to prize or pinch the rear wheels forward with a crowbar and to stop it at the proper place by placing the beveled end of a crowbar on the rail in front of a forward wheel. This was the usual and customary and the safest way. By it the car could be moved so slowly and gently that the man with a crowbar in front could ordinarily stop it with accuracy, ease, and safety. The other possible way under the circumstances existing on the occasion under inquiry was to let the force and tension in the cables incident to drawing a pile toward the car and hoisting it draw the car forward till it reached the proper place, and then stopping it by the use of the crowbar as indicated above. This was an unusual and dangerous way to move and stop the car, according to a tendency of the evidence, especially when the movement, as in this instance, was down grade; and it would seem, indeed, to require no evidence to show that it was more difficult and perilous to scotch and stop a car by chocking its front wheel with a crowbar held in the hand when the car was being pulled forward by the cables attached to a heavy log lying some distance in front of it, than to so scotch and stop one being gradually pinched along with a crowbar under a rear wheel. In the latter case, the car having been set in easy and slow motion by the pinching crowbar, it would only be necessary to overcome its own momentum, while in the former not only its own motion would have to be overcome, but also the force and tension of the cables attached to the pile. And, moreover, very naturally the motion would begin more abruptly in the former case than in the latter and be more rapid, and this even though the drum were stopped as soon as motion had been imparted to the car. On the occasion in question the latter method was adopted. The evidence tends to show that,

having had the cables attached to the pile in front and to the drum in rear of the leads, and intending, while drawing the pile toward the car and eventually hoisting it, by the same force to draw the car forward and have the motion thus imparted to it arrested at the point it was necessary to have it stand. Rhyne ordered the engine and drum to be set in motion, and the pile to be drawn to the car and then up into the position it had to be placed for driving, and, the engine having been started, he then ordered the plaintiff to catch the car with his crowbar, scotch and stop it. Plaintiff attempted to obey this order, but, as a tendency of the evidence shows, the motion of the car was so violent that when he put the end of his crowbar on the track in front of and against the wheel it slipped for a time, and then there was a sort of jerking increase of the movement, the wheel caught the crowbar, wrenched it out of his hands in such way that he was knocked down by it with one of his legs across the rail under the crowbar, and that the wheel mounted the bar as it lay across his leg and ran up it until it was directly above his leg, crushing and mashing it so that amputation was necessary. On these tendencies of the evidence, if the jury found, as it was open to them to do, in line with them, it is fairly inferable that the plaintiff's injuries proximately resulted from the attempt to move the car in this way in connection with Rhyne's order for him to stop it while being moved in this way; and the danger to a person attempting to stop a car with a crowbar which was being thus moved the jury might further have found to have been so apparent to the experienced mind of Rhyne and was so calculated from his point of view to result in injury that he was guilty of negligence in ordering the plaintiff to catch or scotch and stop the car under all the circumstances. Hence our conclusion that the refusal of the trial court to give the affirmative ⁴⁶⁵ charge for defendant cannot be assailed on the ground that there was no evidence that Rhyne was negligent in giving the order.

Nor do we think, as matter of law, plaintiff was guilty of contributory negligence in attempting to obey the order. He had been in the service only a month. He had never seen an attempt made to stop a car under the circumstances existing when this attempt was made. The attempt did not to his inexperience involve obvious danger, risks which a prudent man would not incur; and he had a right to rely to some extent upon Rhyne's greater knowledge and experience and upon the assumption that Rhyne would not expose him to unnecessary

peril, or, at least, it was for the jury to so find if they believed the facts which the tendencies of the evidence favorable to plaintiff went to establish. And the trial court properly left both questions—as to Rhyne's negligence and Savage's contributory negligence—to the jury.

Affirmed.

RAILROADS—CONTRIBUTORY NEGLIGENCE.—AN EMPLOYEE of a railway, who voluntarily puts himself in a dangerous position, where he has no right to be, and when he must have known that the company did not require his presence, and is injured by his own want of prudence, cannot recover for the injury: *Note to Columbus etc. Ry. Co. v. Bridges*, 11 Am. St. Rep. 66. It may be otherwise, however, when the employé acts in obedience to the orders of a superior: *Henry v. Sioux City etc. R. R. Co.*, 75 Iowa, 84, 9 Am. St. Rep. 457; *Metropolitan etc. R. R. Co. v. Skola*, 188 Ill. 454, 75 Am. St. Rep. 120.

HARRIS v. WESTERN UNION TELEGRAPH COMPANY.

[121 Alabama, 519.]

TELEGRAPH COMPANIES—RULES—PRESENTATION OF CLAIM.—A rule of a telegraph company, requiring all messages received by it to be sent on one of its blanks containing a condition that the company will not be liable for damages or penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission, is a reasonable one, binding on the sender of the message, and does not limit the company's liability for negligence.

TELEGRAPH COMPANIES—NOTICE OF RULES.—A plea to a complaint against a telegraph company, averring that a message received for transmission was written on one of the company's blanks, upon which the requirement for notice of damages within sixty days was printed, and was sent subject to the contract expressed thereon, of which this requirement was a part, is the equivalent of an averment of notice of the rule on plaintiff's part.

TELEGRAPH COMPANIES—RULES—WANT OF NOTICE TO SENDER—NEGLIGENCE.—If an agent of a telegraph company receives a message for transmission, written on a plain piece of paper, and, without calling the attention of the sender to the regulations printed on the blanks of the company, pastes the message on one of such blanks, he acts as the agent of the company alone, and the sender is not bound by the regulations printed on the blanks, of which he had no notice, and he may recover for the negligence of the company in the transmission of the message.

G. McDonald, for the appellant.

G. H. Fearons, J. M. Faulkner, and R. Rushton, for the appellee.

520 McCLELLAN, C. J. This action is prosecuted by Mary Harris against the Western Union Telegraph Company, and sounds in damages for the negligent failure of the defendant to promptly transmit and deliver to plaintiff's brother at Milton, Florida, a telegram sent by her from Montgomery, Alabama, and for the transmission and delivery of which she paid defendant's agent. Defendant pleaded the general issue and the following special plea: "2. Defendant avers that at the time said alleged telegram was received by it for transmission, and for a long time prior thereto, it had in force a rule that all messages received by it should be sent on one of its blanks and subject to a contract on the back of said blanks, which said rule was a reasonable one. That the alleged message was written on one of the defendant's blanks and subject to the contract expressed on said blank, and that part of said contract was in the following ^{and} language: 'The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission.' And defendant avers that no claim for damages was presented to it within sixty days after said alleged message was filed with the company for transmission."

The rule here set out is a reasonable one. It does not limit the defendant's liability for negligence, as the demurrer to the plea assumes, but only requires reasonable notice to the defendant of claims for damages. Nor is the plea open to the further objection taken by the demurrer that it does not show that plaintiff was aware of the rule at the time the message was sent. The averment that the message was written on one of defendant's blanks upon which the requirement for notice of damages within sixty days was printed, and was sent subject to the contract expressed thereon, of which this requirement was a part, is the equivalent of an averment of notice of the rule on plaintiff's part. The demurrer to the plea was, therefore, properly overruled.

The evidence without conflict supported the complaint. But the court gave the affirmative charge for the defendant upon the theory that it had proved this special plea; and whether the evidence without controversy does support the plea is the only question for our consideration. We do not think it does. Our conclusion is that there was a failure of proof that the message was written upon one of the blanks of the defendant, and hence a failure to show that plaintiff made the special con-

tract set up in the plea. The uncontroverted evidence was that plaintiff had the message written on a plain piece of white paper—not upon a blank of the company at all; that she then gave the message thus written and signed by her, and also money to pay for its transmission, to one Johnson to carry and deliver it to the office of the defendant for transmission, and to pay for the same; that Johnson did carry the message to defendant's office, and there delivered it to one of defendant's agents in its original form and condition, and paid to such agent the charges for its transmission; that said agent received the message from Johnson and also the charges, and thereupon of his own motion pasted the plain white ⁶²² paper on which the message was written onto one of defendant's telegraph blanks. Neither the plaintiff nor said Johnson knew anything about the company's requirement that messages should be written on its blanks, nor of the stipulation printed on said blanks that notice of claims should be given within sixty days, etc., either at the time the message was delivered to defendant or at any other time prior to the trial of the case, nor was there any evidence tending to show that they had any knowledge or notice of the rule or of the stipulation on the blanks. But it is insisted for appellee that the defendant's employé who received the message and the charges therefor from Johnson or from the plaintiff through Johnson acted as the agent for Johnson and for the plaintiff in pasting the original message onto one of defendant's blanks, and thereby bound the plaintiff by the stipulation expressed on the blank, and this, we suppose, is the view adopted by the trial court. We cannot admit this contention or adopt this view. The business of this employé was to receive the message from Johnson and the charges for its transmission. If the message was not in the form required by the defendant he should have declined to receive it until put in that form, or until, having called Johnson's attention to the requirement, the latter had authorized him, impliedly or otherwise, to make it conform to the rule. When he accepted the message written as it was on a piece of plain paper unaccompanied by any stipulation or words, save those only of the message itself, and accepted payment of the toll for its transmission, then there was upon that instant a contract on the part of the company to send that message promptly to the plaintiff's brother, and for a breach of that contract, or for a breach of duty arising from the contract, the plaintiff had the remedies which the law gave her, unimpaired and unaffected

by the rule and stipulation now pleaded against her, since she had neither notice of the rule nor of the stipulation, and therefore cannot be held to have impliedly authorized defendant's employé to conform her message to the rule, nor to have incorporated the terms of the stipulation expressed on the blank, of the existence of which she was entirely ignorant, into the contract which she in fact made. It is not for us to say, nor was it for the jury to ^{say} say, but that, had she been apprised of all the stipulations, or of this stipulation, expressed on defendant's blanks, she might have declined to enter into the contract at all; but we may at least say that she had a right to decline, and that she cannot be holden to a stipulation which was not embraced in the contract she did make merely because it was defendant's rule, unknown to her, to require persons in her attitude to enter into the stipulation or because the defendant, after making a contract with her that did not embrace the stipulation, pasted her message, which in itself was not clogged by any special conditions whatever, onto a printed blank which contained special limitations and requirements. This does not fall within that class of cases where the agent of a telegraph company performs some service for the sender of a message and in respect of which he is held to be the agent of the sender. Here the message as originally prepared was received by the company, as also the charges for its transmission. There was nothing further to be done by or for the sender. Upon this the duty of transmission was on the defendant, and it had been paid for its performance. Whatever else was done with or about the message was the act of the defendant's employé, and whether in respect of such he is to be considered the agent of the defendant, he was certainly not the agent of the plaintiff.

The complaint having been proved without conflict in the testimony, and the defendant having failed to adduce any evidence supporting a material averment of the special plea, the affirmative charge should have been given for plaintiff, and not, as it was, for the defendant.

The question of the damages recoverable under the complaint does not arise on this appeal.

Reversed and remanded.

TELEGRAPH COMPANIES.—A PRINTED STIPULATION upon the back of a blank used for sending a telegraph message, that the company shall not be liable for damages if the claim therefor is not presented in writing within sixty days after the message is filed for transmission, is unreasonable and violative of the con-

stitution: *Western Union Tel. Co. v. Eubanks*, 100 Ky. 591, 66 Am. St. Rep. 361. Compare *Western Union Tel. Co. v. Dougherty*, 54 Ark. 221, 28 Am. St. Rep. 33.

TELEGRAPH COMPANIES—REGULATIONS OF.—A telegraph company may make reasonable regulations for the conduct of its business, which are binding on its customers after notice thereof: *Western Union Tel. Co. v. Neel*, 86 Tex. 368, 40 Am. St. Rep. 847; and a sender of a telegraph message, written upon a blank supplied by the company and signed by the sender, is bound by reasonable regulations printed thereon, whether he has actual knowledge thereof or not: *Birkett v. Western Union Tel. Co.*, 103 Mich. 361, 50 Am. St. Rep. 374. The power of telegraph companies to impose conditions upon senders of messages is discussed in the monographic note to *Camp v. Western Union Tel. Co.*, 71 Am. Dec. 463-474.

NORTHERN v. HANNERS.

[121 Alabama, 587.]

JUDGMENTS—TORTS—COSTS.—If an action is in tort, judgment for the defendant for costs follows the complaint and is also in tort.

EXEMPTIONS—COSTS—ACTION IN TORT.—If, in an action in tort, defendant recovers judgment for costs, plaintiff cannot claim his statutory exemption against the execution issued against him for such costs.

Whitson, Graham & Haynes, and M. N. Manning, for the appellant.

Stockdale & Stockdale, and Knox, Bowie & Dixon, for the appellee.

§§§ **TYSON, J.** In all civil actions the successful party is entitled to full costs for which judgment must be rendered against the unsuccessful party, unless in cases otherwise directed by law: Code, sec. 1325. It is of no consequence whether the plaintiff or defendant is the successful party. If the defendant is the successful party, he recovers his costs of the plaintiff, for which judgment must be rendered by the court, and he is entitled to have execution upon this judgment issue against the plaintiff, as much so as the plaintiff would be entitled to a judgment and execution for costs and damages had he been successful.

Costs are not recoverable by virtue of any contract, expressed or implied, between the parties litigant, nor is the judgment which the court is authorized to render, indeed, we may say,

which the statute peremptorily declares shall be rendered, based upon any supposed contractual relations existing between the parties to the record. Nor was the statute commanding this judgment to be rendered by its enactment or operation intended to be enforced upon any such theory. At common law, costs were not recoverable and were not adjudged in the judgment in the case: *Stewart v. Hood*, 10 Ala. 600; *City Council v. Foster*, 54 Ala. 63. In certain class of cases the plaintiff was permitted to have the defendant "amerced for his willful delay of justice in not immediately obeying the king's writ by rendering the plaintiff his due, or to have him taken up, capiatu, till he pays a fine to the king for the public misdemeanor which is coupled with the private injury, in all cases of force, of falsehood in denying his own deed, or improperly claiming property in replevin, or to have him adjudged guilty of contempt for disobeying the command of the king's writ." It was not until the enactment of the statute of Gloucester that costs, *eo nomine*, were recoverable by the plaintiff in real actions, and under that statute the practice of the courts was to award costs of the "writ purchased" in addition to the damages recovered against the defendant. By statutes the plaintiff's right to recover all costs was extended to all cases in which he was successful. But no costs were allowed the defendant in any action when he was successful ^{was} until the statute of 23 Henry VIII, which was amended from time to time until he was equitably given the same right as the plaintiff to recover the same costs as the plaintiff would have had if he had recovered. In all cases the costs were taxed by the proper officer of the court: 2 Cooley's Blackstone, bk. 3, p. 399. Courts have, now, no inherent power to award costs, which can be only granted in any cause or proceeding by virtue of express statutory authority: 5 Am. & Eng. Ency. of Pl. & Pr. 110, note 2.

Under the system of costs and fees as provided by our statutes, cost is not granted by the courts of this state as damages to the successful party, but rather in the nature of a penalty imposed upon the unsuccessful party. By express statute the law of costs must be held to be penal: Code, sec. 1353; *City Council of Montgomery v. Foster*, 54 Ala. 63; *Dent v. State*, 42 Ala. 514. The amount of the costs recoverable is limited to the fees of the officers of the court and witnesses required to attend upon the court, which are fixed by law, and whose compensation, as fees, must be paid by the parties at whose instance they are rendered. As to the officers rendering the ser-

vices and the witnesses who attend in obedience to a subpoena, while their fees are taxed so as to make up what is known as the bill of cost in the case and limits the amount of the recovery of the successful party, the cost is not recovered by the judgment in their names, nor have they such an interest in it as entitles any one of them to an execution upon the judgment, except in the case where the plaintiff is the successful party and the execution against the defendant is returned "no property found," execution may issue in the name of the clerk against the plaintiff for all costs created by him: Code, secs. 1361, 1889. So far as the officers of court and the witnesses are concerned, the fees due to them are mere debts based upon an implied promise to pay by the party at whose instance or request they perform the service: *Dane v. Loomis*, 51 Ala. 487; *Hill v. White*, 1 Ala. 576; *South etc. R. R. Co. v. Bradley*, 84 Ala. 468, and authorities there cited. As between them and the parties litigant, they would be compelled to resort to independent suits for services rendered for the collection of ³⁰⁰ their fees, were it not that by the process of execution the costs must be collected by the sheriff, and he is, of course, justified in retaining out of any money collected by him upon the execution the fees due in the cause, since, if paid over by him to the party in whose favor the execution runs, such party could be compelled by suit to pay it back to him for the officers and witnesses entitled to it. The judgment in favor of the successful party for costs, however, has no element of debt in it: *Lathrop v. Singer*, 39 Barb. 396. If it had, certainly the statute commanding the courts to render judgment in favor of the state of Alabama for costs against a defendant convicted of a misdemeanor, and, if not presently paid or confessed, to imprison him or compel him to perform labor, would be violative of that provision of the constitution "that no person shall be imprisoned for debt." That these statutes are not offensive to the constitution cannot now be regarded as debatable: *Morgan v. State*, 47 Ala. 34; *Caldwell v. State*, 55 Ala. 133; *McDowell v. State*, 61 Ala. 176; *Bailey v. State*, 87 Ala. 44.

As to the nature and character of the judgment for the cost, costs being a mere incident to the suit, the judgment partakes of the nature and character of the suit. If the cause of action declared upon by the plaintiff is in tort, the judgment as to damages and costs recovered by him must follow the complaint and of necessity be in tort: *Stuckey v. McKibbin*, 92 Ala. 622; *Williams v. Bowden*, 69 Ala. 433; *McLaren v. Ander-*

son, 81 Ala. 106. And the complaint may be looked to for the purpose of determining the nature of the judgment; indeed, "it has never been the practice to recite in the entry of judgments or for it to appear in any way thereby whether the action and recovery are *ex contractu* or *ex delicto*": *McDaniel v. Johnston*, 110 Ala. 531. If the plaintiff fails in his suit in tort, upon what principle can it be said that the judgment recovered by the defendant against him for cost does not follow the complaint and is in tort? It may be true, as urged by appellee's counsel, that the plaintiff does not become a tortfeasor by the institution of his suit. But it does not follow from this, as argued by him, that the judgment is as upon a ⁵⁹¹ contract. The wrong committed by him for which he became liable for costs to the defendant in the judgment consisted in the institution of a suit that he could not successfully maintain and for which the statute imposed upon him the costs to partake of the nature of his complaint. The exemption of personal property allowed under the constitution and statutes of this state is only as against debts contracted: Const., art. 10, sec. 1; Code 1896, secs. 2033-3037. In the case in hand, the suit of the appellee, plaintiff, was in tort, and he, failing to prosecute it successfully to judgment, was not entitled to claim his exemptions against the execution issued against him for the costs recovered by the defendant, appellant: 1 *Freeman on Executions*, 2d ed., 3217; *Russell v. Cleary*, 105 Ind. 502; *Schouton v. Kilmer*, 8 How. Pr. 527.

The judgment of the circuit court must be reversed and the cause remanded.

THE SUBJECT OF COSTS is discussed in the extended notes to *Ela v. Knox*, 88 Am. Dec. 181-185; *Saunders v. Frost*, 16 Am. Dec. 405-407.

CASES
IN THE
SUPREME COURT
OF
ARKANSAS.

**KANSAS CITY, FORT SCOTT & MEMPHIS RAILROAD
COMPANY v. BECKER.**

[67 Arkansas, 1.]

ACTION—ELECTION TO SUE IN CONTRACT OR TORT.

Where a duty is imposed by law, by reason of the relations of the parties, although the relation was created by contract, a neglect to perform this duty gives the injured party a right of action, and he may elect to sue upon the contract, or treat the wrong as a tort, and bring an action *ex delicto*.

RAILROADS—LIABILITY TO EMPLOYEES UNDER CONTRACT MADE IN ANOTHER STATE.—A railroad company whose line is partly in one state may, under the statutes of that state, be liable in tort to an employe injured in such state, although the contract of service was entered into in another state.

JURY TRIAL—CURING BAD INSTRUCTION BY GOOD.

In an action against a railroad company for injuries occasioned by a defective step on an engine, an instruction which assumes that such step was defective prior to the accident is cured by subsequent specific instructions that the plaintiff must prove the defect, that the company had notice of, or could by reasonable diligence have discovered, such defect prior to the accident, and that the presumption is that the railroad company had no notice of the defect, and that it had furnished safe and suitable appliances for the performance of its work.

MASTER AND SERVANT—CONCURRENT NEGLIGENCE OF A FELLOW-SERVANT AND ANOTHER.—Where an injury is the result of the concurring negligence of two employes, it is no defense to prove that the negligence of one of the employes, who is a fellow-servant, contributed to the injury, where the other employe is not a fellow-servant, and his negligence contributed directly to the injury.

MASTER AND SERVANT—FELLOW-SERVANTS, WHO ARE NOT.—AN ENGINE INSPECTOR employed at a roundhouse and a fireman working on the road are not fellow-servants within the meaning of a statute which requires that different employes, to be fellow-servants, must be working together to a common purpose in the same department of service.

Wallace Pratt, I. P. Dana, and W. J. Orr, for the appellant.

E. F. Brown and N. F. Lamb, for the appellee.

* **BATTLE, J.** This is the second time this action has been before this court on appeal. The opinion delivered when it was here the first time is reported in *Kansas etc. Ry. Co. v. Becker*, 63 Ark. 477. It was instituted by William Becker against the Kansas City, Fort Scott & Memphis Railroad Company to recover damages for personal injuries. Plaintiff was a fireman in the employment of the defendant, and was engaged with others in running an engine of his employer from Thayer, Missouri, to Memphis, Tennessee, and return, Thayer being the starting point. He left the latter place about 6 o'clock in the evening on the 21st of April, 1894, and arrived at Memphis about 4:30 in the morning of the next day, and, returning, left Memphis about 6 o'clock in the evening of the 22d of April, and was injured at Afton, in this state, about daylight of the following morning. He was seriously and permanently injured by the step on the left-hand side of engine No. 30, on which he was employed, turning as he jumped upon it in order to get into the engine cab, the engine being at the time in motion. As a result of the injury, amputation of one of his legs just below the knee was necessary.

To be more specific, we relate the cause, manner, and circumstances of the injury more at length. At the rear end of the engine, at the entrance to the cab, were two steps—one on either side—for the use of employes. The engineer and fireman rode in the cab—the former on the right side, and the latter on the left. Each step was fastened to the lower end of an iron or steel rod. The upper end of the rod passed through an iron beam nine inches thick, and was fastened and held in place by means of a tap at the top. When in proper position, the step faced out at right angles to the side of the engine. When the rod was loose, the step could be turned out of place, but this defect could be remedied by means of the tap. A short time before plaintiff was injured, the engine on which he was acting as fireman and the train attached were moved on a sidetrack at Afton for the purpose of allowing a passenger train to pass. While the former train was upon the sidetrack, * the plaintiff, by direction of the engineer, left the cab to put out the headlight, and while so doing the passenger train passed. About the time he finished his work, the engineer commenced moving the train from the sidetrack upon the main line, and,

while it was running about as fast as a man would ordinarily walk, plaintiff attempted to get upon the engine by means of the left step, and was injured in the manner stated.

The maintenance of the steps in good repair and safe condition was intrusted to two employes of the defendant. It was the duty of the engineer, when his engine was on the road and away from Thayer, to examine and keep the steps in safe condition by means of the tap at the end of the rod, for which purpose he was provided with the necessary tools. It was also his duty, when he ran his engine into the roundhouse at Thayer, where the engines operated on the road between Thayer and Memphis, on their return from the latter place, were inspected and repaired, to report any defects in his engine which needed repairing, and blanks were furnished him for the purpose. At Thayer was a machinist, named Johnson, whose duty it was to inspect the lower part of the locomotives, including the steps, when they came in, as a protection against any neglect of the engineer. Johnson also made repairs. The bad condition of engine numbered 30, if attributed to the fault of anyone, was due to the negligence of one or both of these employes. To prove that the defendant was liable for the culpable negligence of these employes in the failure to discharge their duties, evidence was adduced in the trial of this action tending to prove that the engine numbered 30 was taken on the 18th of April, 1894, to its shops at Thayer for inspection and repair, and that on the 21st of April, two days before plaintiff's injury, an employe of the defendant, while in the roundhouse at Thayer, discovered that the engine step on the left or fireman's side was loose, and turned half way round so that it projected under the engine, and that the engineer on the 22d of the same month, while at Memphis, discovered the step on the right side of the engine to be loose, and tightened it, and that the left step was loose on the next day, when the plaintiff was injured. On the contrary, evidence was adduced by the defendant to show that the steps were not loosened at the shops when the engine was there for repairs on the 18th of April, and that the inspector examined them, and did not notice that either of them was loose or turned, and that the engineer examined the left step on the evening of April 22, 1894, at Memphis, by striking it with a hammer—the usual test—and found it apparently "all right."

The jury before whom the issues were tried returned a verdict in favor of the plaintiff against the defendant for the sum

of five thousand dollars, and the court rendered judgment accordingly. To reverse this judgment, an appeal by the defendant to this court is prosecuted.

It is insisted by appellant that its duties to appellee were imposed and governed by the laws of Missouri, where he was employed and their contract for service was entered into, and that the risks assumed by the contract were determined by the same laws; that the relation of master and servant could be created between them by contract; and that the duties and risks assumed grew out of that relation. It is true that the relation was created by contract, but the duty upon which the appellee relies to recover in this action, if it existed, was imposed by law, and arose from the relation rather than the contract. For a neglect to perform this duty, the appellee had the right to elect to sue upon the contract, or to treat the wrong suffered by the neglect as a tort, and bring an action *ex delicto*. The rule in such cases as this is correctly stated in *Nevin v. Pullman Palace Car Co.*, 106 Ill. 222, 46 Am. Rep. 688, 11 Am. & Eng. R. R. Cas. 92, 101, as follows: "Where the duty for whose breach the action is brought would not be implied by law by reason of the relations of the parties, whether such relations arose out of a contract or not, and its existence depends solely upon the fact that it has been expressly stipulated for, the remedy is in contract, and not in tort, when otherwise case is an appropriate remedy": *Clark v. St. Louis etc. Ry. Co.*, 64 Mo. 440; *Bliss on Code Pleading*, 3d ed., sec. 14; *Pomeroy's Code Remedies*, 3d ed., secs. 568-571; 4 *Elliott on Railroads*, sec. 1693.

The railroad of appellant is built and operated in part in this state. In regard to such railroads the constitution provides as follows: "All railroads which are now or may hereafter be built and operated, either in whole or in part, in this state shall be responsible for all damages to persons and property, under such regulations as may be prescribed by the general assembly": *Const. 1874*, art. 17, sec. 12. Section 6249 of *Sandels & Hill's Digest* provides: "All persons who are engaged in the common service of such railway corporations [foreign or domestic, doing business in this state], and who, while so engaged, are working together to a common purpose, of same grade, neither of such persons being intrusted by such corporations with any superintendence or control over their fellow-employés, are fellow-servants with each other; provided, nothing herein contained shall be so construed as to make employés of such corporation

in the service of such corporation fellow-servants with other employés of such corporation engaged in any other department or service of such corporation. Employés who do not come within the provisions of this section shall not be considered fellow-servants." And section 6250 provides: "No contract made between the employer and employé, based upon the contingency of the injury or death of the employé limiting the liability of the employer under this act, or fixing damages to be recovered, shall be valid and binding." The effect of these statutes is to limit the risk assumed by an employé on account of the acts or omissions of persons in the service of the same employer to the neglect of those who are fellow-servants within the meaning of the statutes, and to impose upon the master the duty to protect him against the neglect of all other fellow-employés in the discharge of their duties, and to render the employer liable in damages for injuries suffered on account of the failure to discharge this duty.

The appellant was and is subject to and governed by these statutes, and is liable to its employés in tort for injuries caused by the failure to discharge any duties growing out of them.

The appellant says that the court erred in giving to the jury an instruction in words as follows: "If you find from the evidence that it was the duty of Bennett to inspect the engine for the defective step, and that by the exercise of ordinary * care he could have discovered the defect, and if you find that the step was defective, and that it was also the duty of Johnson to inspect the engine for such defect, and that he, by the exercise of ordinary care and observation, would have discovered the defect, and that when the plaintiff was injured, if he was injured, he and said Johnson were not engaged in the same department of service of the defendant, and were not working together to a common purpose, and that negligence of said Johnson, if you find that he was negligent, contributed to, or was in part the cause of, plaintiff's injury, and that the plaintiff was not injured by reason of want of ordinary care for his own safety then your verdict will be for the plaintiff."

This instruction, it says, was defective because it assumes that the step was defective at some time prior to the accident when the engineer and Johnson should have made their inspection, or when they did in fact make it. If this was a defect, it was cured by the following instructions given at the instance of appellant:

"1. Becker, by virtue of his employment, assumed all the ordinary and usual risks and hazards incident to his employment, and the railroad company was not an insurer of the perfection of the step in question, or the safety of Becker—the railroad company being required to exercise reasonable and ordinary care and diligence, and only such, in furnishing to its employes reasonably safe machinery and instrumentalities for the operation of its railroad; and it will be presumed, in the absence of anything to the contrary, that the railroad company has performed its duty in such cases, and the burden of proving otherwise rests upon Becker. And in this case, as Becker seeks to recover damages for injuries resulting from alleged defective steps furnished by the railroad company, it not only devolves upon him to prove such defect, but it also devolves upon him to show, either that the railroad company had notice of such defect complained of, or that by the exercise of reasonable and ordinary care and diligence it might have obtained such notice; and proof of a single defective or imperfect operation of such step, resulting in injury, is not of itself sufficient evidence, nor any evidence, that the company had previous knowledge or notice of such defect.

"2. You are further instructed that although you may find and believe from the evidence that the step in question was loose, and that it turned with Becker, and he thereby received the injuries complained of, still he is not entitled to recover in this action unless he has shown by a preponderance of the evidence (that is, a greater weight of the evidence) that the defendant, or its servants who were intrusted with the duty of inspection, had notice of the fact that said step was loose prior to the time of the injury, or that the step was loose a sufficient length of time before the injury that its condition could have been discovered by the defendant, or its said inspectors, by the exercise of reasonable care, and could not have been discovered by Becker by exercise of the same degree of care; and, unless the plaintiff has so shown, you will find for the defendant. And you are further instructed that knowledge on the part of witness Buck that the step was loose at Thayer is not knowledge to the defendant company.

"3. The presumption is that the railroad company has done its duty by furnishing safe and suitable appliances for the performance of its work, and, when this is overcome by positive proof that the appliances were defective, the plaintiff is met by a further presumption that the railroad company had no

notice of the defect, and was not negligently ignorant of it. It is not sufficient to show that the plaintiff was injured, and that the injury resulted from a defect in the step, but he must go further, and establish the fact that the injury happened because the railroad company did not exercise proper care in the premises, in discovering and repairing said step."

At the request of the appellant, and with the consent of the appellee, the court instructed the jury that Bennett, the engineer, and appellee, the fireman, were fellow-servants at the time the injury occurred. Now, appellant's counsel says: "If we admit . . . that Bennett, the engineer, did not inspect this step at Memphis, and did not apply the usual test to ascertain its condition, and that he was negligent, it being admitted in this case by the record that Bennett and the plaintiff were fellow-servants, then we submit that there is no room for ^s reasonable minds to differ on the proposition that Bennett's negligence was the direct and promoting cause of this injury, because, but for his negligence (admitting that he was negligent, and admitting that the step was defective at Memphis), the injury could not have happened, and his negligence, if he was negligent, was not a contributing cause, but was the direct, immediate, last moving, and approximate cause of the accident"; and for this reason they say that the instruction objected to by appellant, as before stated, was defective, and should not have been given. But this is not correct. The trial court told the jury, by this instruction, that if they found that the step by which the appellee was injured was defective, that Johnson negligently failed to discover that it was in that condition, that his negligence contributed to the injury, and that he was not a fellow-servant of Becker, they should return a verdict in favor of appellee. If such findings were true, Johnson's negligence was a proximate cause of the injury; for there is no evidence that he fastened the step when the engine was at Thayer, the last time before the accident occurred. He testified that he did not. If they were loose, then they remained so until they were fastened; and the evidence shows that the left step, which was the cause of the injury, was not fastened until after the accident. The only negligence of Johnson which could have contributed to the injury was his failure to exercise proper care in the inspection of the step, and, if it contributed, it set the trap which caught and injured the appellee. The failure of the engineer to fasten the step did not render the negligence of Johnson harmless

or less effective, but left it free to work the injury it was lying in wait to inflict. The injury was probably the result of the concurring negligence of the two employes, and may not have occurred in the absence of either. It is no defense, however, for the appellant to prove that the negligence of the engineer contributed to it: 1 Shearman and Redfield on Negligence, 5th ed., sec. 188, p. 292, and cases cited. This necessarily follows from the imposition of the duty to inspect on both employes, and the purpose it was intended to serve; for it was imposed upon both to serve as a check against the negligence of each of them, and to protect appellee against consequent injuries.

⁹ The appellant complains because the court refused to instruct the jury in the following words: "You are instructed that it is a rule of law that the railroad company is not liable to any of its employes for the negligence of a fellow-servant; and under the evidence in this case you are instructed that, with reference to the act complained of, and at the time Becker was injured, he and Inspector Johnson were fellow-servants, and, if you find and believe from the evidence that Becker was injured through the negligence of said Johnson, then the railroad company would not be liable for such negligence of said Johnson."

Were Johnson and Becker fellow-servants? Under the statutes of this state, four conditions must concur to constitute different employes of the same railway company fellow-servants: 1. They must be engaged in the common service of the railway company; 2. While so engaged, they must be working together to a common purpose; 3. Neither of them must be intrusted by the railway company with any superintendence or control over their fellow-employes; 4. They must be engaged in the same department of service.

Did the relations of Johnson and Becker conform to all these conditions? Johnson was an inspector and repairer of all of appellant's engines at Thayer—about fifty or sixty in number—and Becker was a fireman on one of them. Johnson's duty was to inspect the engines in the roundhouse, and make such repairs as he could in the way of screwing up bolts and nuts, and putting in springs, and other work. In addition to his duties on the road, it was the duty of Becker, as fireman, to see that his engine was provided with tools, and that the tool-boxes and supply-boxes for oil were kept locked when the engine was in the roundhouse, and, before his engine started

out on the road, to see that it was provided with a full tank, that there was sand in the sand-boxes, that the ashpan was in a clean condition, and that a fire in the engine was prepared for the road, and on and off the road to keep the engine clean and the signal lamps in repair. His chief duties were performed on his engine while on the road. Johnson was in the mechanical department, and subject to the authority of the roundhouse ¹⁰ foreman, and Becker, when off the road and at Thayer, was subject to the same authority, and while on the road in the discharge of his duties was in the transportation department, and subject to the authority of the superintendent of the same; but it seems that the roundhouse foreman could, while he was on his engine on the road, discharge him for neglect of duty, or order him to leave his engine for the purpose of discharging a duty at some other place. Until he exercised this authority, however, Becker, while on the road, was in the transportation department, and subject to the authority of those in control of that department. When Becker was at Thayer, his and Johnson's duties were different, and were not such as to associate and bring them together in their work, except casually when they might work on Becker's engine at the same time, Becker cleaning and Johnson inspecting or repairing. They could not be said to have been working together, except when and so long as they were so actually engaged. Their working together was not sufficient to constitute them associates in labor any longer than it continued, no more than the casual meeting of individuals for short periods of time could constitute them associates. As they were not working together in the same department at the time the accident occurred, it follows that they were not fellow-servants at the time when Becker was injured, and that the instruction asked for by the appellant to the contrary effect was properly refused.

We think that the evidence was sufficient to sustain the verdict of the jury in this court.

Judgment affirmed.

Bunn, C. J., did not participate.

ACTIONS.—A PARTY MAY ELECT TO SUE IN TORT instead of in contract where the breach of the contract constitutes a wrong: *Sheldon v. Steamship Uncle Sam*, 18 Cal. 527, 79 Am. Dec. 193. Where the duty for whose breach the action is brought would not be implied by law by reason of the relations of the parties, whether such relations arose out of contract or not, and its existence de-

penda upon the fact that it has been expressly stipulated for, the remedy is in contract and not in tort; when otherwise, case is an appropriate remedy: *Nevin v. Pullman etc. Co.*, 106 Ill. 222, 46 Am. Rep. 688.

RAILROADS—INJURIES TO SERVANT.—THE LAW OF THE STATE in which a railroad brakeman is injured through a fellow-servant's negligence determines his right to recover therefor, though that law is opposed to the law of the state where the negligence occurs, the parties are domiciled, and the contract of employment is made: *Alabama etc. R. R. Co. v. Carroll*, 97 Ala. 126, 38 Am. St. Rep. 163. See, too, *Mexican etc. Ry. Co. v. Jackson*, 89 Tex. 107, 69 Am. St. Rep. 28.

NEGLIGENCE, CONCURRENT—LIABILITY FOR.—If an accident occurs from two causes, each due to the acts of different persons but together the efficient cause, all the persons whose acts contribute to the accident are liable for a resulting injury, and the negligence of one is no excuse for the negligence of the other: *Gulf etc. Ry. Co. v. McWhirter*, 77 Tex. 356, 19 Am. St. Rep. 755. See, too, *Pugh v. Chesapeake etc. Ry. Co.*, 101 Ky. 77, 72 Am. St. Rep. 362; and the extended note to *Carterville v. Cook*, 16 Am. St. Rep. 250-257.

FELLOW-SERVANTS.—AS TO WHO ARE and who are not fellow-servants, see the note to *Fisk v. Central Pac. R. R. Co.*, 1 Am. St. Rep. 81-83.

MORRIS v. FLETCHER.

[67 Arkansas, 105.]

HUSBAND AND WIFE—IMPROVEMENTS ON WIFE'S PROPERTY—RIGHTS OF CREDITORS.—Where a husband expends large sums of money in the permanent improvement of his wife's property, thus rendering himself insolvent, such money may be treated by his creditors as a charge upon the lands for debts existing at the time the improvements were made.

FRAUDULENT CONVEYANCES TO WIFE.—Where a husband owns the reversionary interest in lands in which his wife owns the life interest, and, after expending large sums of money in improving them, conveys his interest to his wife, completely depriving himself of the ability to pay his debts, such conveyance is fraudulent and void as to his creditors.

Williams & Bradshaw and John C. England, for the appellants.

Trimble and Rose, Hemingway & Rose, for the appellees.

¹⁰⁷ **BATTLE, J.** The first-mentioned action was instituted by the administrator and heirs of W. T. High, deceased, against the administrator and heirs of Lizzie J. High, to set aside a deed of conveyance of certain lands, which was executed to Lizzie J. by W. T. High in his lifetime. The grounds of the

action, as set forth in the complaint, are that W. T. High, being the owner of the lands mentioned, conveyed them to Lizzie J. on the nineteenth day of February, 1887, she then being his wife; that High and his wife each had children by former marriages; that the consideration of the deed was the promise of Mrs. High to execute a last will and testament, and thereby devise the lands which were conveyed to her to the children of both of them, by existing and previous marriages, equally, share alike; that, having acquired the lands, she refused to execute the will, as she promised, but departed this life intestate, leaving the defendants, Lilly Morris, Lula Hicks, and John Hicks, as her sole heirs at law; and that a large number of claims have been probated against the estate of W. T. High, and there are no assets in the hands of his administrator with which to pay them.

The last-mentioned action was commenced by certain creditors of W. T. High, deceased, against the administrator and heirs of Lizzie J. High. The plaintiffs alleged in their complaint ¹⁰⁸ that W. T. High departed this life on the 17th of February, 1887, largely indebted to them; that letters of administration had been issued to W. P. Fletcher; that his estate is wholly insolvent, and his administrator had in his hands no assets to pay his debts; that they had probated claims against his estate as follows: Daniel & Strauss for the sum of one hundred and sixty-nine dollars and forty-five cents, Sanders for the sum of two hundred and sixteen dollars and seventy-nine cents, Eagle for one hundred and seventy-nine dollars and thirty-four cents, and T. H. Knodel for nine hundred and twenty-two dollars and thirty cents; that these debts or claims are wholly unpaid; that, on the nineteenth day of January, 1887, at a time when he owed all of said debts, and was the owner of certain lands of great value, W. T. High conveyed them to his wife, Lizzie J., thereby denuding himself of all means of paying his debts, and leaving himself utterly insolvent; that the conveyance was entirely voluntary, and a fraud upon their rights; and that the defendants are the heirs and administrator of Lizzie J. High, deceased; and prayed that the deed be set aside, and the lands thereby conveyed be subjected to the payment of the debts which W. T. High owed to them.

The plaintiffs in both these actions asked the court to set aside the same conveyance, being in controversy, and no other.

The defendants in each case answered and denied that W. T. High was ever the owner of the lands described in the com-

plaints; and alleged that all these lands belonged to Isaac C. Hicks, who departed this life leaving Lizzie J. Hicks his widow; that they were regularly set apart to his widow by a court of competent jurisdiction as dower; that, the estate of Hicks being insolvent, the reversionary interest in them was sold to pay debts; and at this sale, W. T. High, who had previously intermarried with Lizzie J. Hicks, became the purchaser of the same, for and in her behalf, and paid therefor with her "funds," and without her knowledge and consent took the deed therefor in his own name; and that, on the nineteenth day of January, 1887, W. T. High, at the request of his wife, conveyed to her the reversionary interest in these lands, thereby vesting in her the legal and equitable title to the same.

The allegations of plaintiffs in the complaint in the last-mentioned action as to the indebtedness of W. T. High to each ¹⁰⁰ of them, as to the probate and allowance of their claims against his estate and the nonpayment thereof, as to the existence of this indebtedness on the 19th of January, 1887, when he executed the deed of conveyance to his wife, and as to the effect of the deed in denuding him of the means to pay his debts and leaving him insolvent, are wholly undenied.

In the first action the circuit court, sitting in chancery, found the consideration of the deed which was executed by W. T. High on the 19th of January, 1887, was the promise of his wife, Lizzie J., to execute a will and thereby devise the lands in controversy equally to the children of each; and decreed that the promise to make a will be enforced by vesting in the children the interest they would have taken had the will been executed, that is, by vesting in each of them one undivided twelfth part of the lands, there being twelve children.

In the last-mentioned case the court found that the deed executed by High to his wife on the 19th of January, 1887, was voluntary and a fraud upon the rights of the plaintiffs, and set it aside as to them and all other creditors whose claims existed at the time it was executed, and have been legally probated; and decreed that, "unless the defendants within six months pay to plaintiffs the amounts of their respective claims, with accrued interest thereon," and costs of this action, "the said lands will be turned over to the probate court of Lonoke county to be disposed of in the regular administration as the assets of the estate of said W. T. High, deceased, for the payment of said debts due from said estate." The defendants in both actions appealed to this court.

The finding of the court in the first action that the consideration of the deed executed by High to his wife on the 19th of January, 1887, was a promise of the wife to make a will is entirely unsupported by the evidence. The consideration is stated in the deed, but no promise to make a will is recited as any part of such consideration. On the contrary, the recitals tend to refute allegations to that effect. No will was demanded as a condition of the delivery of the deed. Mrs. High testified that in 1886, when she was in bad health, and ¹¹⁰ was not expected to live long, her husband requested her to make a will, and both of them for a while believed that they would, but afterward abandoned it, and that a promise to make a will was no part of the consideration of the deed. The evidence clearly shows that the making of wills was considered and discussed by them, but does not show that the deed was, wholly or in part, based upon any such consideration.

High remained in possession of the lands in controversy about eleven years before he executed the deed, and in that time made valuable improvements upon them. If they had been the separate property of his wife, and belonged to her in fee, and he was insolvent at the time, money expended by him in the permanent improvement of the same, though expended without a fraudulent intent in fact, could have been treated by his creditors as a charge upon the lands for debts existing when the improvements were made. Materials furnished by a husband and used for such purposes, under such circumstances, with the knowledge and consent of his wife, are regarded as a gift in fraud of his creditors. As in other cases, he must be just before he is generous; and he cannot defeat his creditors in the collection of his debts by placing his property in the name of his wife in the guise of improvements upon her estate. It is said: "When the debtor with his family lives on the property of his wife, he may keep it in repair and habitable. Within reasonable limits, this may be regarded as a necessary and proper means of performing his obligation to support his wife and family. But whenever the expenditures are beyond what is absolutely necessary and proper for the shelter and maintenance of the family, they may be reached by his creditors. What amounts to an excessive expenditure is difficult to determine, and depends upon the peculiar circumstances of each case. If he puts improvements upon her real estate which are temporary in their character, and primarily calculated to promote his use and enjoyment of the premises as tenant for life,

her estate cannot be charged with the value of the temporary improvements." But under no circumstances can the husband's creditors make the wife's separate estate liable for mere labor performed by him: *Nance v. Nance*, 84 Ala. 375, 5 Am. St. Rep. 378; *Humphrey v. Spencer*, 36 W. Va. 11; ¹¹¹ *Lynde v. McGregor*, 13 Allen, 182, 90 Am. Dec. 188; *Kirby v. Bruns*, 45 Mo. 234, 100 Am. Dec. 376; *Bump on Fraudulent Conveyances*, 4th ed., sec. 218.

There is still another rule which governs the rights of the husband's creditors in respect to the wife's property, and it is this: A wife who gives her husband unlimited control of her property, and permits him to hold the title in his own name and use it as his own for a series of years, is not, in case of his insolvency, permitted to shield it from the just claims of persons who, in good faith, have given the husband credit, in reliance upon his ownership. "In such a case a conveyance by the husband to the wife is fraudulent and void as to creditors": *Driggs v. Norwood*, 50 Ark. 46, 7 Am. St. Rep. 78; *George Taylor Com. Co. v. Bell*, 62 Ark. 32; *Stull v. Graham*, 60 Ark. 461.

Tested by the rules we have stated, was the deed which was executed by High to his wife void as to his creditors? The lands described in it, except forty acres, were set apart to Mrs. High as dower in the lands of Isaac O. Hicks, deceased, her former husband. The reversionary interest in the same was conveyed by the administrator of Hicks to Mr. High. The forty acres were purchased at private sale, and were conveyed to W. T. High by the vendor. High took control of all the lands. At the time he took possession, all of them, except ten acres, were wild and unimproved. He held possession and controlled them, ostensibly as his own, for about eleven years. He sold all his real estate, and expended seven thousand dollars or eight thousand dollars of his own money in improving them. He caused to be cleared and put in cultivation about two hundred acres of the land assigned to his wife as dower and in controversy, and erected houses and other improvements on the same, which, with the clearing and preparing for cultivation, was of the reasonable value of eight thousand dollars. In selling his real estate to improve them, he deprived himself of all means to pay his debts except the property improved. Still he contracted debts. After he had sold all his real estate, and expended large sums of money in improving them, he conveyed the lands to his wife, and completely deprived

himself of the ability to pay his debts. At this time he was indebted to the plaintiffs in the second action. In contracting ¹¹² debts with him, or giving him time to pay them, they certainly relied upon the property held by him in his own name, which he improved and made valuable by his materials, for the payment of his debts. Without any other means to earn money, as he was, they could not expect him to pay his debts when he had no property. Tested by the rules we have stated, the conveyance was obviously fraudulent and void as to them.

The decree in the first action is reversed, and the cause is remanded, with instructions to the court to dismiss the complaint, and in the other it is affirmed.

When a Wife's Separate Estate may be Charged by Her Husband's Creditors with the Value of Its Increase Due to His Acts.

This subject is a branch of fraudulent conveyances between husband and wife, since the only reason why the husband's creditors should acquire any interest in the increased value of the wife's property is because such value has been added in violation of their rights and as a fraud upon them. This increased value of the wife's estate may come about in one of four ways: 1. By the husband placing improvements on the wife's land through the expenditure of his money or property; 2. By the husband placing improvements on the wife's land or by increasing its value by means of his own skill, labor, or exertion; 3. By increasing the wife's estate through the husband's management of her separate business; and 4. By the husband making a part payment on the purchase price of her property.

Husband Spending Money in Improving Wife's Land.—The general rule must be borne in mind that a gift to a wife from her husband which injures creditors is unlawful: *Smith v. Sommers Mfg. Co.*, 69 Ill. App. 230. It is this principle that renders vulnerable the voluntary spending of money by a husband in the improvement of his wife's separate property, because, if such improvements were to be paid for by her, she would occupy the position of an innocent purchaser. Its voluntary nature gives it the character of a gift. It must also be remembered that if the property used in making the improvements is of such a character that the husband's creditors would have no right to it in his hands, the fact that he has used it in increasing the value of his wife's property will not alter its character so as to render it liable in its changed form to the payment of their debts. Hence, if the amount expended by him in improving her estate is of less value than the amount exempted from execution in his hands, his creditors cannot impeach as fraudulent such voluntary disposition of his property, and her es-

tate will not be charged with the value of the improvements: *Nance v. Nance*, 84 Ala. 375, 5 Am. St. Rep. 378; *Burdge v. Bolin*, 106 Ind. 175, 55 Am. Rep. 724; *Nash v. Stevens*, 96 Iowa, 616. Similarly, if the expenditure of his means in permanent improvements on his wife's lands is made in good faith, in the repayment of an existing indebtedness to her, it is not a fraud upon creditors: *Frost v. Steele*, 46 Minn. 1. And where the statutes of a state permit a wife to dispose of her real property only in a prescribed manner, her interest cannot be subjected to the claims of her husband's creditors, merely because he has used his means in erecting improvements on such land: *Thurber v. La Roque*, 105 N. C. 301. Where, however, the improvements have been put upon the wife's separate realty by the husband for the purpose of defrauding his creditors, such creditors can follow the amount invested in the improvements, and the wife's realty can be charged with the value of such improvements. This is the ruling in the principal case, and it is well sustained by the best authorities. "It would be contrary to the plainest principles of right and justice," said the court in *New South Bldg. etc. Assn. v. Reed*, 96 Va. 245, 70 Am. St. Rep. 858, "to permit an insolvent husband to divert his means, and invest it in improving his wife's separate estate, which is not liable to his debts, and thus defeat the demands of his creditors." To the same effect is *Burt v. Timmons*, 29 W. Va. 441, 6 Am. St. Rep. 664; *Kirby v. Bruns*, 45 Mo. 234, 100 Am. Dec. 376; *Trefethen v. Lynam*, 90 Me. 376, 60 Am. St. Rep. 271; *Rose v. Brown*, 11 W. Va. 122; *Core v. Cunningham*, 27 W. Va. 206. Her husband's creditors may reach the value of such improvements, even though the property has been sold, if the wife still retains the money: *Blair v. Smith*, 114 Ind. 114, 5 Am. St. Rep. 593; *Collins v. Slade* (Ky.), 9 S. W. Rep. 245. If a husband is in embarrassed circumstances at the time he makes the improvements on his wife's land, the money or materials furnished will be regarded as a gift in fraud of his creditors: *Nance v. Nance*, 84 Ala. 375, 5 Am. St. Rep. 378. Such a gift is treated in the same manner as any other voluntary conveyance in fraud of creditors: *Ware v. Seasongood etc. Co.*, 92 Ala. 152; *Ware v. Hamilton Brown Shoe Co.*, 92 Ala. 145. In *Arnold v. Elkins*, 67 Miss. 675, it was held that where a husband purchased personal property with his own means and affixed it to his wife's realty, such property was deemed to be his, in a contest between his wife and his creditors, in the absence of any written recorded transfer to her.

There are some cases in which the value of improvements on the wife's land cannot be followed by the husband's creditors. But they are mainly cases in which there was no intent to defraud creditors, and where the husband was making improvements which were necessary for the proper support and maintenance of his family. Thus in *Robinson v. Huffman*, 15 B. Mon. 80, 61 Am. Dec.

177, the husband had expended between four and five hundred dollars in the repair of a dwelling-house on his wife's land, and which was occupied by the family. At the time of making such repairs there was a judgment against him in favor of the plaintiff, who sought to reach the improvements in satisfaction of his judgment. The sum expended was shown to be no more than was necessary to place the house in a habitable and decent condition, and the court, in regarding it as a necessary and proper means on the part of the husband of performing his obligation to support his wife and family, said: "To charge the wife's property with the expense for the benefit of creditors would seem to be little better than to make it liable for his expenditures in furnishing food and clothing for her and her children." *Dick v. Hamilton*, 1 Dedy, 822, is a similar case. The same principle was applied and the creditors denied any relief. But the court suggested that the rule had legitimate limits, that it furnished both temptation and opportunity to practice fraud upon creditors, and said "that whenever it appears, or there is reasonable ground for presuming that expenditures have been made by the husband upon the wife's estate, beyond what is absolutely necessary and proper for the shelter and maintenance of the family, that the expenditure ought to be considered a gift to the wife in fraud of the rights of creditors. What will amount to such a gift and what will not is difficult to determine beforehand. Each case must rest upon its peculiar circumstances." But a wife will not be allowed to absorb her husband's property under the cover of family support, when the effect of the transfer is not the support of the family, but to store the property away from the reach of creditors. Hence, where a husband erects a stable on the separate property of his wife at the expense of his existing creditors, they may subject such addition to her estate to the payment of their debts: *Trefethen v. Lynam*, 80 Me. 376, 60 Am. St. Rep. 271. The mere expenditure of money by a husband in the erection of improvements on the lands of his wife will not in itself be deemed fraudulent as to subsequent creditors. Hence, where improvements were mainly completed before a debt was contracted, the creditors could not subject the wife's land to the payment of their claims: *Barto's Appeal*, 55 Pa. St. 886. The case of *Corning v. Fowler*, 24 Iowa, 584, appears to be in conflict with the principles heretofore laid down. The improvements in this case consisted of a house, stable, and other improvements which were unnecessary to the proper maintenance of the family. The husband was insolvent at the time. But the court refused to allow the creditors to subject the wife's land to the extent of the improvements placed thereon, upon the theory that the husband had acquired no interest in her property, and that she could not be considered a trustee holding the improvements for the benefit of his

creditors. The court admits that a voluntary gift or conveyance of property to the wife for the purpose of defrauding creditors could be followed by the creditors in equity. "But," says the court, "this rule can have no application where the husband makes with his own means improvements on the lands of the wife, without any contract that he acquired an interest thereby in the realty, or that she was to be liable or accountable to him for the value thereof. The expenditure was voluntary—not under any contract—and it would place at the disposal of an insolvent and spendthrift husband the entire real property of the wife, if his creditors could follow the means expended by him, thus voluntarily thereon, and enforce their claims or liens to the extent of such expenditure." This opinion touches more distinctly than any other the true difficulty in holding that a wife's lands may be subjected to the claims of her husband's creditors because he has made expenditures thereon while insolvent or in contemplation of insolvency. In nearly every state she cannot convey her lands, nor create any charge thereon, except by an instrument in writing, executed according to prescribed formalities, and in none can such transfer or encumbrance be made or created by the act of her husband alone. If he chooses to make improvements, there may be equity in treating them as still his, to the same extent as if he had erected them as a tenant on property whose lease had not expired, and who retains, therefore, the right of removal; but there is surely no sufficient reason in law or equity for making such improvements a charge on the wife's land very similar in its nature to a mortgage actually executed by her thereon. To so hold is to give her husband a dominion over her property denied him by law.

This raises the question as to whether the wife must have participated in the fraudulent intent of the husband in order to subject her property to the payment of his debts to the extent of its increased value due to the improvements. Certainly, if the husband is not in debt at the time the improvements are made, there is no fraudulent conveyance as to subsequent creditors generally, the improvements become a part of her separate estate and cannot be reached by the husband's subsequent creditors: *Peck v. Brummagim*, 31 Cal. 441, 89 Am. Dec. 195. The general rule undoubtedly is that a voluntary gift is void if made to defraud creditors, whether the donee participated in the fraud or not. If a gift of improvements on a wife's land is subject to a different rule, and requires that the wife shall have participated in the fraudulent intent, there must be some reason for it. The land, of course, belongs to the wife, and her title cannot generally be subjected to the payment of her husband's debts. It is for this reason that some of the authorities say that the land of the wife cannot be sold at the suit of the husband's creditors unless the wife participated in the husband's fraud in placing the improvements on her prop-

erty. But it must be noticed that this applies only to the actual sale of the wife's property. The gift of the improvements is deemed, even by these cases, void as to existing creditors, and if such improvements can be applied to the payment of debts without actually selling the wife's land, the court will grant the husband's creditors such relief, and it is unnecessary in such a case to show that the wife participated in the fraud of her husband, since a voluntary gift by the husband to defraud his creditors is void, however innocent the donee may have been. This was recognized in *Maddox v. Summerlin*, 92 Tex. 483, where, after stating that the wife's real property could not be sold by the husband's creditors where she did not participate in the fraud, the court said that if the improvements are otherwise subject to sale the creditors might reach them, and intimated that a court of equity could adjust the interests of the parties, and while fully protecting the wife's title to the land and all the benefits she derived from it, at the same time would give to the creditors the benefit of the property which ought to be applied to the payment of their debts. Where the statutes of a state prohibit a wife from parting with the title to her lands except in a prescribed manner, it is very likely that she cannot be deprived of such title by a sale, unless she participates in the fraud of her husband in placing improvements thereon: *Holder v. Orump*, 10 Lea, 320. And where such statutes exist, her active participation in the fraud of her husband will estop her from asserting her title as against her husband's creditors: *Heck v. Fisher*, 78 Ky. 643. Where the wife has actively participated in the fraud, the courts have at times refused to pass upon the question whether the creditors could subject her separate property to the payment of their debts in the absence of such fraudulent participation: *Blair v. Smith*, 114 Ind. 114, 5 Am. St. Rep. 593. But if the value of the added improvements can be reached by the creditors without injury to the interest of the wife, they may have such relief, and a fraudulent intent on the part of the wife would, in such case, appear to be immaterial. Hence, if the property has been sold, the proceeds of the sale, to the extent of the enhanced value of the property, may be attached by the husband's creditors: *Collins v. Slade* (Ky.), 9 S. W. Rep. 245. Where no statute exists which prevents the alienation of the title of a wife's separate estate, and the husband diverts his money or property from the payment of his debts, and uses them in placing permanent improvements on his wife's land, his creditors in many of the states can follow the money so expended, whether there was an actual intent to defraud or not. This is the rule established by the principal case. An insolvent cannot thus divert his property to the injury of his creditors: *Trefethen v. Lynam*, 90 Me. 271, 60 Am. St. Rep. 271; *Humphrey v. Spencer*, 86 W. Va. 11; *Lynde*

v. McGregor, 18 Allen, 182, 90 Am. Dec. 188; Hoot v. Sorrell, 11 Ala. 386; Kirby v. Bruns, 45 Mo. 234, 100 Am. Dec. 378; Core v. Cunningham, 27 W. Va. 206. Such a transaction is fraudulent in fact as against existing creditors, and a specific fraudulent intent on the part of the wife is immaterial: Core v. Cunningham, 27 W. Va. 206. To hold otherwise would be to ignore the real character of the transaction, and would furnish an easy method for creditors to evade their just debts when they possessed sufficient tangible property which might otherwise be reached. We are not now considering those cases where the improvements are due solely to the labor and skill of the husband.

Community property is subject to the payment of debts. A husband may, of course, make a gift of such property to his wife, and his creditors cannot complain if they are not defrauded thereby: Peck v. Brummagin, 31 Cal. 441, 89 Am. Dec. 195. But in Woodland Lumber Co. v. Link, 16 Wash. 72, where the land was purchased with community funds and the improvements placed thereon with the same kind of funds, it was held that the property was presumptively community property, and the husband's creditors could reach it, though the title was taken in the wife's name with the intent to make her a gift. And in Maddox v. Summerlin, 92 Tex. 483, where improvements were erected on the wife's separate estate with community funds, it was held that such improvements did not become a part of the wife's separate property, but remained a part of the community property, and as such were liable for the husband's debts, if it could be sold separate from the wife's land.

Improving Wife's Land by Labor.—Where a husband, by means of his own labor and skill, places improvements upon his wife's separate property, there is no interest which his creditors may reach, at least in the absence of actual fraud: Webster v. Hildreth, 83 Vt. 457, 78 Am. Dec. 632; White v. Hildreth, 82 Vt. 265. The mere control by a husband of his wife's property will not per se operate to defeat her rights as against the creditors of her husband: Coon v. Rigden, 4 Colo. 275. The principle upon which it is held that a husband's creditors have no claim upon his wife's separate estate which has been improved by his labor, to the extent of its improved value, is, that a creditor has no claim upon his debtor's services. A debtor has a right to work or be idle as he sees fit, and his creditor has no right to compel him to work and earn money for his benefit, nor is he defrauded if the debtor chooses to work for another person gratuitously. Hence, where a man performs all the carpenter work upon a dwelling-house erected upon his wife's land, his creditors have no claim upon such improvement because it has added value to her land: Eilers v. Conradt, 39 Minn. 242, 12 Am. St. Rep. 641. A husband has the right to give his personal services and skill to the manage-

ment of his wife's property without any other consideration therefor than the support and maintenance of himself and family. And the results of his labor on land owned by his wife are not subject to levy for the payment of his debts: *Seay v. Hesse*, 123 Mo. 450. That a wife's property has been increased largely and rapidly through the sagacity and industry of her husband does not give his creditors any right to reach such increment: *Martin v. Remington*, 100 Wis. 540, 69 Am. St. Rep. 941.

The adding of improvements to a wife's property or increasing its value merely by the use of skill and labor has been thought to be quite different from the erection of improvements with money or property. In the latter case it is claimed there is the taking of actual tangible property which a debtor might seize in satisfaction of his debt, and by using it in improving another's (his wife's) property he thus diverts it from its legitimate use and to the detriment of existing creditors. In the first case, however, personal labor and skill is all that has been used, and personal labor is not the subject of compulsory sale for the payment of debts. It is neither susceptible to seizure at law, neither can the jurisdiction of equity operate upon it: *Nance v. Nance*, 84 Ala. 375, 5 Am. St. Rep. 378. As was said in *Hoot v. Sorrell*, 11 Ala. 386: "When the husband merely expends his personal labor in the improvement of his wife's estate, the estate is not thereby made a debtor to the husband, nor can the creditors charge it with the value of the labor." Where a man lives with his wife on her farm, and bestows his labor upon it, his creditors cannot seize any of the products of the farm in satisfaction of their debts: *Phillips v. Hall*, 160 Pa. St. 60. If the title to the property is really in his wife, he has no interest in crops which are grown upon her land and which he has helped to cultivate, and his creditors, consequently, have no greater interest in them than he has. The wife is entitled to the rents, issues, and profits of her own real estate: *Gage v. Dauchy*, 34 N. Y. 293. In the absence of an express agreement to compensate a husband for work upon his wife's separate property, there is no implied obligation to pay him. Even if there were an express obligation to pay, this would give the husband's creditors no right in the crops which were raised on her lands as a result of his industry: *Lewis v. Johns*, 24 Cal. 98, 85 Am. Dec. 49. Where a wife owns livestock which is kept and cared for by her husband, its increase is not liable for his debts: *Russell v. Long*, 52 Iowa, 250. Where a wife leases a farm which is cultivated in part by her husband, this does not of itself render the products of the farm subject to his debts. An insolvent husband may perform labor on a farm owned or leased by his wife, and if the result is merely to furnish reasonable family support, there is no defrauding of creditors: *Feller v. Alden*, 23 Wis. 301, 99 Am. Dec. 173; *Carn v. Royer*, 55 Iowa, 650. The mere fact that a man lives with his wife on her farm, works on it, and

acts as her agent in carrying it on, without any agreement as to compensation, does not vest the ownership of the farm products in him so that they shall be subject to the process of his creditors. Such crops are her separate property: *Hossfeldt v. Dill*, 28 Minn. 469; *Stout v. Perry*, 70 Ind. 501; *McIntyre v. Knowlton*, 6 Allen, 565; *Feller v. Alden*, 23 Wis. 301, 99 Am. Dec. 173. Even if a married woman purchases a farm entirely on credit, and her husband lives with her on the farm and carries it on as her agent, the crops raised belong to her and are not subject to sale for her husband's debts: *Dayton v. Walsh*, 47 Wis. 113, 32 Am. Rep. 757. The purchase by the wife was here made in good faith. The ownership and carrying on of the farm must have been in good faith. It must not be a transaction by the husband in his wife's name as a cover to protect the products of the land from his creditors: *Hossfeldt v. Dill*, 28 Minn. 469. The supreme court of Illinois seems to recognize the rule we have been treating, and admits that a husband, by working on his wife's farm, does not thereby make the farm products his so that they may be taken for his debts: *Dean v. Bailey*, 50 Ill. 481, 99 Am. Dec. 533; *Bongard v. Core*, 82 Ill. 19. But this support is given in such a halting manner as to make it doubtful how far the rule extends. In *Elijah v. Taylor*, 87 Ill. 247, it was held that the products were the property of the husband to the extent that he could sue for their price. And in *Wortman v. Price*, 47 Ill. 22, that a woman could not make her husband her agent to engage in trade, to be managed by him, to which all his time and energies were to be devoted, without subjecting the property used and its profits to the payment of his debts.

The rule has been asserted in some of the cases that a husband, in working on his wife's land, may only do so much as is reasonably necessary for the support of himself and his family, and if his labor on his wife's property and his attention to her business exceed in value the cost of such support, his creditors are entitled to the ascertained excess: *Commonwealth v. Fletcher*, 6 Bush, 171; *Board of Education v. Mitchell*, 40 W. Va. 431; *Carn v. Royer*, 55 Iowa, 650; *Coyne v. Sayre*, 54 N. J. Eq. 702. See, also, *Brown v. Brown* (Ky.), 47 S. W. Rep. 758. Certainly, if a husband uses his wife's land as his own, raises crops on it which he gathers and treats as his own, his creditors may reach such products, because the intention is clear to treat them as his own property: *Plaisted v. Hair*, 150 Mass. 275. To what extent his creditors may assert rights to the products of a farm owned by his wife, but managed by him would depend largely on the character of the statutes conferring rights on a married woman to manage her own property. If she has full right to control it as she sees fit, and to use it in her separate business, and her husband is permitted to manage it for her, any profits derived therefrom should belong exclusively to her, however large those profits might

be, and her husband's creditors have no more right to reach such profits than they have the profits of any other business of which he happened to be the manager. This will more clearly appear in our next subdivision. The mere fact that the title to land is in a wife does not in itself establish conclusively her title to crops grown upon the land by her husband as against his creditors. The burden is on her to establish her right to the crops: *Evenson v. Pownall*, 182 Pa. St. 587; *Martin v. Remington*, 100 Wis. 540, 69 Am. St. Rep. 941.

Increase of Wife's Estate Through Management of Her Husband.—At common law, marriage worked an absolute gift to the husband of all his wife's personal estate of which she was possessed or which might come to her during coverture, including her earnings, or the products of her skill and labor: *Grant v. Sutton*, 90 Va. 771. Hence, a married woman, who is not authorized to manage her own separate property, or to carry on business as a sole trader, yet does so through her husband, is not entitled to the profits of the business as her separate estate, and her husband's creditors may attach such property for his debts: *Woodcock v. Reed*, 5 Allen, 207. And a woman who is not a sole trader, yet who carries on a business through the agency of her husband, is not protected from the claims of his creditors, and the earnings of the business and any property purchased with them are subject to her husband's debts: *Grant v. Sutton*, 90 Va. 771. It is solely by virtue of statutory enactments that a wife is permitted to manage her own separate property, or to carry on a separate business and to enjoy her earnings in such business as her own. Where her earnings must be acquired in carrying on an independent business of her own, earnings made in any other way are not exempt from the claims of her husband's creditors: *Triplett v. Graham*, 58 Iowa, 185. In some states a married woman who carries on a business on her separate account must file a certificate to that effect, and, if she fails to do so, her personal property used in such business is liable to attachment by the creditors of her husband: *Snow v. Sheldon*, 126 Mass. 332, 30 Am. Rep. 684; *Harnden v. Gould*, 126 Mass. 411. A statute which permits a husband to give his wife the proceeds of her own labor, free from the claims of his creditors, does not authorize her to carry on business for herself. Hence, if she does carry on such separate business, even through the agency of her husband, the avails of the business remain his property and are liable to be seized and taken in execution for the payment of his debts: *Quidort v. Pergeaux*, 18 N. J. Eq. 472. But if the statute clearly intends that a married woman may engage in business with her separate estate, for the purpose of preserving and increasing it, she may employ her husband to manage such business, if done in good faith, and the accretions, accumulations, and appreciation in value of her separate property resulting from the business inure to the

benefit of the wife. The law of agency is not changed by the marital relation, and her husband as agent acquires no interest in the increase of her property which may be seized by his creditors: *Miller v. Peck*, 18 W. Va. 75. Some statutes, as for example in Nevada, prohibit the wife from carrying on a business in her own name when it is managed or superintended by her husband. Hence, if she allows him to control the business, or any separate branch of it, she brings herself within the prohibition of the statute, and must suffer the consequences, and her husband's creditors may subject the property used in the business to the payment of his debts: *Youngworth v. Jewell*, 15 Nev. 45.

The statutes of a state must be examined in order to determine to what extent a married woman may carry on business managed by her husband and at the same time leave the avails of such business free from the claims of his creditors. Under a proper married women's act, a husband could give his wife his entire skill and labor in managing her separate business in defiance of his creditors, where, in the absence of such an act, his creditors could reach the profits of such business. So, in order that a man may present his entire services to his wife so as to free the results of those services from his creditors she must be competent to receive the gift. This is why we find such statements as these in reported cases: "While a husband may, as against his creditors, allow his wife to have for her separate use the earnings of herself, . . . he may not give to her, to be invested in her own name, the proceeds of his own business, skill, and labor": *Quidort v. Pergeaux*, 18 N. J. Eq. 472. "An insolvent husband may stipulate beforehand that the proceeds of his labor shall be appropriated to the sole and separate use of his wife, and such stipulation is no fraud upon his creditors": *Hodges v. Cobb*, 8 Rich. 50. The statements in these two cases are in apparent conflict. In the first case a husband's skill and labor were used in the management of his wife's separate property, and profits accrued as a result of such management. But these profits, instead of belonging to the wife, belonged to her husband, because she was not permitted to carry on a business of her own, and the common-law rule, of necessity, prevailed that the profits of personal property which resulted from such business were the husband's. The wife was not competent to receive the gift of his skill and labor in the increase of her personal property. Hence, like any other property which he might acquire, it was liable for his debts. In the second case, however, the husband used his labor and skill in the service of a third person. He could have given his services to such third person if he had desired, and the profits resulting from the business would have belonged to the third person, because he was a competent person to receive such a gift. His creditors could not object, because the husband had

acquired no property which could be reached by them. His skill and labor resulted in profits which belonged to a third person, hence his creditors could not touch them; while in the first case his skill and labor resulted in profits which belonged to himself (since his wife was not competent to receive them), hence his creditors could subject them to the payment of his debts. This fundamental principle must be remembered, viz., that a debtor is not obliged to work for his creditors or to work at all. His creditors cannot levy execution upon him and compel him to work for them. While a creditor cannot set apart the fruits of his labor after they have been realized, in disregard of the rights of his creditors, yet before they are earned he may make any bargain he wishes in regard to his services and his creditors are not defrauded, because they have been deprived of nothing to which they have a right. This was clearly pointed out in *Hodges v. Cobb*, 8 Rich. 50: "If he had agreed to sell his labor to White, on terms the most improvident, as for his mere maintenance or for less, how could his creditors have rectified that? If he had made a more reasonable and thrifty contract with White, as, for example, that he would labor for him, on condition that he would maintain his wife and children, and articles consumed in the use were accordingly applied, what fraud would there be, in such case, upon creditors—what scope would have been found for their executions—what would they have lost to which they could show any title? If White, by the promptings of a benevolent sympathy, should have agreed to add something more enduring, in the hands of a trustee, for the use of the wife, no infringement of a creditor's right can be detected in that. . . . Neither difference in sums, nor in time, fortunate or unfortunate adventures, provident or improvident contracts, in a debtor's selling his labor by previous stipulation, can alter a principle." From this it seems to follow logically that where a woman is permitted to carry on a separate business in her own name, and to enjoy the profits thereof, and to employ any agents she desires, including her husband, in the management of such business, she stands in the position of any other business proprietor and may hire on any terms she is able to make. Consequently, her husband can sell his labor and skill to her on any terms, or voluntarily give her his time and skill, and the profits of the business, however large they may be, are her separate property, which the creditors of her husband cannot reach in any manner.

The business must, however, in reality belong to the wife. If she is merely the nominal head, and the business is, in fact, her husband's, the property and its increase will not be protected as hers against his creditors. Such an arrangement is a mere attempt to keep his property free from liability for his debts. It amounts to a fraud upon creditors, and the law will not sanction it. Thus where an insolvent husband transferred his business to his wife, without consideration, and thereafter pretended to carry it on as

her agent, without any compensation, it was held that the transaction constituted a scheme to defraud his creditors, and that the property together with any property which had been purchased from the profits of the business, could be subjected to the payment of his debts: *Manning v. Carruthers*, 88 Md. 1. Again, where a wife was acting as a sole trader, but she had had no previous mercantile experience, and most of the money employed in the business was borrowed in her name, but, in fact, was loaned for the benefit of the husband, the transaction was deemed to be a fraudulent device to hinder and delay his creditors, and the firm assets were subject to the payment of his debts: *Farmers' Bank v. Marshall* (Ky.), 35 S. W. Rep. 912. To be a sole trader, a wife must, in good faith, carry on business on her own account. If her husband arranges with her that she engage in business as a sole trader for the mere purpose of shielding their joint earnings against his existing and subsequent creditors, and with the understanding between them that the property used in, or acquired by, the business shall belong to both, and the husband has power to dispose of it, this is a fraud upon the creditors, and the property is liable for the husband's debts: *Hurlburt v. Jones*, 25 Cal. 225; *Thomas v. Desmond*, 63 Cal. 426. An insolvent debtor can never use his wife's name as a mere device to cover, and keep from his creditors, the assets and profits of a mercantile business which is in truth his own: *Hyde v. Frey*, 28 Fed. Rep. 819. So where a woman, after her husband had become insolvent, commenced business in her own name, using capital loaned to her by her husband's father, the husband transacting all the business in his wife's name, it was held that a loan to the wife under such circumstances became the debt of the husband, the business was really his own, and the stock of goods used in the business was liable to execution at the suit of his creditors: *Hallowell v. Horter*, 35 Pa. St. 375. The case of *Glidden v. Taylor*, 16 Ohio St. 509, 91 Am. Dec. 98, appears to be a border line case. The money actually employed here belonged to a wife, and the business was carried on by her husband as her agent, resulting in large profits which were invested in her name. It was held that the surplus profits, after deducting the amount applied to the support of the family was liable to the claims of his creditors. It will be noticed that the business was really that of the husband. No relation of employer and employé existed, and the husband managed the business as he saw fit, and spent the proceeds of the business in any manner he desired, without any control being exercised by his wife. Further, the married women's act of Ohio seems simply to have made certain property of a married woman her separate property which, without the aid of the statute, would not have been such. Hence a married woman was entitled only to her separate property and its proceeds. And the court said that the profits and proceeds in controversy could, "in no just sense, be said to be either the income, increase, or profits of the money" which belonged

to the wife. Such profits were the product of the husband's skill. No question of the right of a married woman to carry on a separate business seems to have been involved under the Ohio statute. This case is, therefore, easily distinguishable from those in which a married woman's right to conduct a separate business is clearly given. Under the Illinois married women's act of 1861, "a married woman cannot engage in a general trade or business, with her husband as the managing agent, to which he must devote his time and energy, and yet all his earnings be beyond the reach of his creditors": *Wilson v. Loomis*, 55 Ill. 352; though she may employ him as a mere clerk in her store, if done in good faith: *Cubberly v. Scott*, 98 Ill. 88. This is due, however, to the limitations of the statute as construed by the Illinois supreme court. But even under similar statutes a different rule, and we believe the better rule, has been adopted. And where an act makes all the real and personal property of a wife her separate property, together with the income, increase, and profits thereof, and such property is placed under her sole control, not liable to be taken for the debts of her husband, she may make her husband her agent to manage her separate property, and the increase and profits thereof under his management cannot be subjected to the payment of his debts. This was so held in *Johnson v. Christie*, 79 Mo. App. 46, where it was said, that "if the wife is a feme sole as to her separate property and may contract with her husband as with anyone else, she will be entitled to the result of his labor and skill, just as she would were he some third person employed by her." This, we believe, is the correct rule. But recognizing the ease with which imposition and fraud could be practiced upon creditors, the court said that the mere fact that the title to the property and to the capital used is in the wife's name does not necessarily make it her business, and placed this reasonable limitation upon the rule: "That while the wife is entitled to the increase, income, and profits of her separate estate and may employ her husband as her agent to manage the business for her, and thereby become entitled to the result of his skill and labor in that behalf, yet it must appear that it is her business, and not a device to keep from his creditors the profits and income of a business which is really his own. It is a question of fact whether the husband is really managing the wife's business, or is merely carrying on his own." A court of equity will closely scrutinize such a relation, to see whether the employment is bona fide and whether the business is clearly that of the wife: *Talcott v. Arnold*, 64 N. J. Eq. 570. But a debtor cannot be compelled to work for his creditors. And a man may bestow all his time, labor, and skill to the increase of his wife's separate estate, and allow his just obligations to go unpaid. The property is hers, and cannot be levied on by execution, or attached for his debts: *Bogges v. Richards*, 39 W. Va. 567, 45 Am. St. Rep. 938; *Deere etc. Co. v. Bonne*, 108 Iowa, 281, 75 Am. St. Rep. 254. The distinction is drawn in some cases that

while at law the increase of a wife's estate is free from the claims of her husband's creditors, yet a court of equity has power to subject a portion of such increased value to the payment of his debts: *Boggees v. Richards*, 39 W. Va. 567, 45 Am. St. Rep. 938. We do not believe such a distinction is sound, however, because, where a woman is given the right to manage her own property and to engage in any kind of business as a feme sole, she stands on the same footing as any other business person, and may employ an agent to carry on her business. The fact that she constitutes her husband such agent gives him no greater rights in her property than any other agent would have. The business thus carried on is not a fraud upon the husband's creditors if his money is not used in the conduct of the same: *Kirkley v. Lacey*, 7 Houst. 218. The law gives the creditor no power over the volition of his debtor. It is a matter of his own free choice whether he labors for himself or for another. If he works for himself the products of his labor belong to himself, and may be reached by his creditors. And if he chooses to work for another, such products belong to that other, and his creditors are not defrauded. The same principle applies where the debtor works for his wife. As was said in *King v. Voos*, 14 Or. 91: "If he choose to give his services to his wife, in the management of her separate property or business, the fruit of such labor is not his, but another's, and, on principle, the creditor cannot seize and appropriate it to the payment of his debt. So that if a husband choose to give his wife his services in the conduct of her separate business, the creditor, having no power over his volition, or to compel him to work for his benefit, is not defrauded." This is a correct statement of the law and if a husband does not use his own money or property in the business, the proceeds which arise from the conduct of her separate business belong to her: *Aldridge v. Muirhead*, 101 U. S. 897. And in the conduct of her separate business, a married woman may purchase property wholly on credit, and hold the same against her husband's creditors: *Walter v. Jones*, 148 Pa. St. 589. A wife may also be a bona fide creditor of her husband, and is entitled to the same protection out of his assets as are his other creditors. Hence a wife, who is such a creditor, and who in conjunction with other creditors obtains judgment against him, and his stock of goods is sold upon execution against him to her and two other creditors, who continued the business, employing the husband as a clerk, may afterward buy out the other two creditors, and continue the business in her name, and she may employ her husband to manage the business, without subjecting the profits accumulated thereby to the claims of his creditors: *Mayers v. Kaiser*, 85 Wis. 382, 39 Am. St. Rep. 849. In sustaining the wife's claims the court here said, "that the time, talents and industry of a debtor are at his own disposal, and that his creditors have no claim thereto; that he may bestow them gratuitously upon whom he will, and upon his wife as well as another, and that he

cannot be compelled to labor for the benefit or advantage of his creditors." To the same effect see *Arnold v. Talcott*, 55 N. J. Eq. 519; *Taylor v. Wanda*, 55 N. J. Eq. 491, 62 Am. St. Rep. 818; *Wood v. Armour*, 88 Wis. 486, 43 Am. St. Rep. 918; *Rush v. Vought*, 55 Pa. St. 437, 98 Am. Dec. 769; *Parker v. Bates*, 29 Kan. 597; *Ploss v. Thomas*, 6 Mo. App. 157; *Abbey v. Deyo*, 44 N. Y. 343; *Spering v. Laughlin*, 113 Pa. St. 209; *Stringfellow v. Sorrella*, 82 Tex. 277; *Sheldon v. Shattuck*, 106 Mich. 344. It is a question of fact for the jury whether the evidence shows that the wife is within the protection of this rule: *Spering v. Laughlin*, 113 Pa. St. 209; *Abbey v. Deyo*, 44 N. Y. 343; *Baxter v. Maxwell*, 115 Pa. St. 469. As already stated, the business must in fact be hers. But the fact that she applies an indefinite portion of the income of her business to his support does not impair her title, and will not subject such income to the claims of his creditors: *Buckley v. Wells*, 83 N. Y. 518. And a married woman who has accumulated property through the agency of her husband may invest it in other property without making the latter liable for his debts: *Lister v. Vowell* (Ala., 1890), 25 So. Rep. 564.

Some of the cases, while accepting the general rule that the ordinary increase of a wife's separate estate, which is used in her separate business managed by her husband, belongs to her, have grafted this limitation upon it, namely, that if, after the support of the family is provided for, a surplus of profits remains, equity will, in a proper case, divide the surplus between the wife and her husband's creditors. The proper case seems to be where the excess of profits are traceable directly to the skill and labor of the husband: *Trappnell v. Conklyn*, 37 W. Va. 242, 38 Am. St. Rep. 30. See, also, *Penn v. Whiteheads*, 12 Gratt. 74. Under the theory of these cases a man's right to work for his wife and to manage her separate estate is, as against his creditors, limited to the actual support of the family and an uncertain amount beyond this, to be determined in each particular case. If the wife has a right to use her separate estate in business and enjoy the profits thereof, and may employ her husband to manage it at all, we fail to see how the conclusion can be escaped that her husband may wholly manage her separate property, and that the profits derived from such management, however large, belong solely to her. Certainly, if the husband was working for a third person, the profits of the business would belong to the owner of the business, and not to the employé. If the wife is given a similar right to control her own property, its increase should be hers the same as that of any other property owner. In *Bogges v. Richards*, 39 W. Va. 567, 45 Am. St. Rep. 938, a husband's creditors were allowed to reach the surplus profits accumulated in his wife's separate business. Here it was held "that if a man skilled in any employment does business in his wife's name with the capital furnished by her, and large profits, over and above the necessary expenses of the business, including the support of himself, wife, and

family, accrue therefrom owing to his skill and experience, and he turns such profits over to his wife or invests them in property for her, a court of equity will treat such arrangement as fraudulent, and will make an equitable distribution of such profits between the wife and existing creditors of the husband." But, as observed by Mr. Freeman, in commenting on this decision: "It is well to remember, in connection with this language, that it applied to a case in which a man, owning property, conveyed it, in contemplation of his approaching marriage, to his intended wife for the purpose of defrauding his creditors, of which purpose, however, she had no notice; and that in every subsequent act and scheme the husband was, in the opinion of the court, actuated by a desire to avoid his creditors, and to so manage his business that the very considerable profits accruing therefrom and from his labors should not result in any fund or property subject to the satisfaction of their demands; and that he appeared to take special delight in showing how skillfully he had managed to increase the value of his wife's estate 'magnificently, and yet secure it beyond the reach of the clutches of his own creditors.' This, doubtless, incited the court to extreme language and measures for the purpose of thwarting an unconscionable scheme and formulating rules to discourage future attempts of a like nefarious character. The language of wrath, even when justifiable, is rarely applicable to ordinary affairs, and this is especially true when it takes the form of general rules": 1 Freeman on Executions, 3d ed., sec. 127a. A rule similar to the one announced in the West Virginia case was given expression in *Talcott v. Arnold*, 54 N. J. Eq. 57, where it was held that a debtor could give to his wife in her separate business, or in respect to her separate property, only those incidental services which a husband, as head of a family, would naturally render. Beyond this the profits of her business might be subjected to liability for his debts. This case was, however, reversed in 55 N. J. Eq. 519, upon the authority of *Taylor v. Wanda*, 55 N. J. Eq. 491, 62 Am. St. Rep. 818, and the general rule asserted that a married woman can invest her separate estate in any legitimate business, and employ her husband as her agent to carry it on for her, without rendering the profits of the business liable for his debts. The profits of the business are, like the capital itself, the separate property of the wife. In some cases the right of a husband's creditors to share in the profits of his wife's business managed by him is asserted, when, from the facts in the case, it clearly appears that the husband used his own means and property in helping to increase his wife's property: *Brooks-Waterfield Co. v. Frishie*, 99 Ky. 125, 59 Am. St. Rep. 452. Of course, such a state of facts discloses an actual gift of property to which the creditors are entitled. Every case must stand upon its own facts, and the courts will closely scrutinize any business dealing between husband and wife, to ascertain whether the arrangement was made in good faith or not, since the mere fact of the relationship itself

furnishes an excellent opportunity for the perpetration of fraud. So, where a husband uses and deals with his wife's separate property as his own, a gift is presumed, and their testimony of a private understanding between themselves that the transaction was intended as a loan is not sufficient, as against the creditors of the insolvent husband, to rebut the presumption: *Bennett v. Bennett*, 37 W. Va. 396, 38 Am. St. Rep. 47. And where persons have, in good faith, given a husband credit in reliance upon his ownership of property which his wife has permitted him to use and invest in his business, she cannot shield such property from the just claims of such creditors: *Riley v. Vaughan*, 116 Mo. 109, 38 Am. St. Rep. 586; *De Votie v. McGerr*, 15 Colo. 467, 22 Am. St. Rep. 426. Similarly, if a married woman has voluntarily made fraudulent representations in reference to her separate property, by which others are deceived and induced to give credit to her husband on the faith of the property, she will be precluded from asserting her claim against the rights of those who have confided in, and acted upon, her representations, whether they were true or false: *Cravens v. Booth*, 8 Tex. 243, 58 Am. Dec. 112. Where a woman receives remittances from her husband, they being a part of his income, and invests them in her separate business, and then pays family expenses out of the proceeds of that business, the burden is upon the wife, as against her husband's creditors, to show affirmatively the amount actually consumed in such expenses, and that no wrong was worked to the husband's creditors: *Trefethen v. Lynam*, 90 Me. 876, 60 Am. St. Rep. 271. In a similar case, *Aaronson v. McCauley*, 19 N. Y. Supp. 690, a married woman saved a sum from moneys furnished by her husband for household expenses, and invested the money in a small grocery business, and the court held that the groceries were liable for the debts of the husband. In *Hamilton-Brown Shoe Co. v. Lastinger* (Tex. Civ. App.), 26 S. W. Rep. 924, a portion of the goods used in a wife's separate business was purchased out of community property. Community property being subject to the payment of the husband's debts, it was held that, as against her husband's creditors, she could claim only such part of the goods as could be traced as having been purchased by her own separate money. When a husband and wife live and work together, the presumption is that her services are performed in her relation of wife, and that the business is that of her husband, so that ordinarily his creditors may reach the proceeds and profits of such business. Hence, where the supplies of a boarding-house were largely furnished by the husband, and the debts contracted were mainly treated as his, it was held that the wife could not treat the proceeds derived from the business as hers, as against his creditors: *Schlitz Brew. Co. v. Estee*, 86 Hun, 22.

Husband Making Part Payment on Wife's Property.—The general rule that a gift to a wife in fraud of creditors may be reached by the husband's creditors who have been defrauded clearly applies

to the payment of a portion of the purchase price of land which is the separate property of the wife, for in such a case money or property to which the creditors would otherwise be entitled, has been diverted from its legitimate function of paying debts, and has been given to the wife, in violation and in fraud of creditors' rights. And the rule applies both to a payment on the purchase price and to a payment in satisfaction of an encumbrance upon the property: *Blair v. Smith*, 114 Ind. 114, 5 Am. St. Rep. 598; *Fink v. Nolan* (Ky.), 54 S. W. Rep. 948; *Wheeler v. Biggs* (Miss.), 15 So. Rep. 118; *McGregor etc. Hardware Co. v. Horn*, 146 Mo. 129. It seems, however, that the mere payment of the taxes on the property and of interest on encumbrances are not such payments as can be charged against the wife's property by the husband's creditors. Such expenditures seem to be viewed as being in the nature of family support: *Hamill v. Henry*, 69 Iowa, 752. Where the part payment on the purchase price has been made out of community funds, the property may be subjected to the payment of the husband's debts: *Woodland Lumber Co. v. Link*, 16 Wash. 72. Where property is purchased in the name of a wife, no money being paid, the intention of the husband being to pay for it out of the proceeds of his own labor on the property, the crops raised on such land are subject to execution for the husband's debts, at least when the property is purchased in this manner with the intent to defraud creditors: *Turner-Looker Co. v. Garvey* (Ky.), 43 S. W. Rep. 202.

If the money or property, which the husband uses in paying for the property purchased by his wife is exempt from execution at the time it was so disposed of, the gift thereof can be no fraud upon the husband's creditors, and they cannot subject the property so purchased to the satisfaction of a judgment against the husband: *Robb v. Brewer*, 60 Iowa, 539; *Wallace v. Mason*, 100 Ky. 560.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY v. TOUHEY.

[67 Arkansas, 209.]

RAILROADS—MASTER AND SERVANT—VICE-PRINCIPAL, WHO IS A.—A YARD FOREMAN of a switch crew, who has no authority to employ or discharge men, but who can report them when they fail or neglect or refuse to do their work, is a vice-principal and not a fellow-servant, under a statute which defines a vice-principal as a person intrusted by a railroad company with the authority of superintendence, control, or command of other persons in the employ of the company, or with the authority to direct any employé.

RAILROADS—INJURY TO EMPLOYÉ—IMPENDING DANGER.—In an action to recover for the death of an employé, an instruction is correct which states that if, at the time the deceased jumped from the car, the appearance of danger to him was sufficient to justify a person of reasonable firmness and prudence in believing that his safety required him to jump from the car in order to escape the impending danger, then the fact that his death resulted from injuries received in making such jump will not defeat the action, even if the deceased might have escaped uninjured had he made no effort to leave the car.

RAILROADS—ASSUMPTION OF RISKS BY EMPLOYÉ. Although a railroad employé assumes all the risks ordinarily incident to such employment, he does not assume a risk created by the negligent act of the railroad company, but only such risks as he knows to exist or may know by the exercise of ordinary care.

RAILROADS—EVIDENCE OF NEGLIGENCE.—There is sufficient evidence to establish the negligence of a railroad company through its vice-principal, where, while wrecked cars which are in charge of such vice-principal are being run at the rate of five or six miles an hour, an employé riding on one of them is killed by a collision of one of the cars with a semaphore pole, and there was ground for apprehension that the cars would careen so much as not to pass objects along the track.

Dodge & Johnson, for the appellant.

Marshall & Coffman and Trimble & Robinson, for the appellee.

212 BUNN, C. J. Thomas Dalton, an employé of the appellant company, was killed by the falling of a semaphore pole near its tracks in its yards in North Little Rock on the 6th of November, 1895, and the appellee, John W. Touhey, was appointed administrator of his estate, and brought this suit against the company for the benefit of the widow and children of the deceased, laying the damages at fifteen thousand dollars. The defendant answered, putting in issue all the material allegations **213** of the complaint. A jury trial was had, resulting in a verdict of eight thousand dollars for plaintiff, and defendant appealed.

The allegations as to negligence in the complaint are as follows, viz.: "Plaintiff says that the defendant so carelessly and negligently caused and allowed its cars to be and remain in a defective and unsafe condition as aforesaid, and so carelessly caused and allowed its said semaphore pole to stand too near its track, and so carelessly and negligently, by and through its foreman as aforesaid, caused its cars to be moved while in such condition, well knowing the same, and his said intestate not knowing it, and in such a careless and negligent manner, as to cause the death of his said intestate, as aforesaid." In

this there are two distinct charges of negligence, one in having the pole too near the track, and the other in permitting its cars to be moved as they were on the track in such condition as that in which they were at the time.

The first question raised is whether or not C. Streeter, the foreman of the crew in charge of the wrecked cars, was a fellow-servant with the others of the crew, among whom was the deceased, or was a vice-principal to the company. The testimony of Streeter affecting the question is substantially as follows, viz.: He states that on the 5th of November, 1895, he was engine foreman in the defendant's yards in North Little Rock; that there were three damaged cars brought into the yards at that time, and that he received a switch order between 9 and 10 o'clock that evening with regard to these cars, but that he could not tell [remember] from whom the list came. His switch crew consisted of Ryan, Harmon, and Dalton, and the engineer, Phillips, and a fireman whose name he could not remember; that these men constituted his switching crew in the yards, and were working under him. The duty of witness and this crew was to do any work needed in the yards, switching and moving cars, including damaged cars, to and from the tracks in the yard to the repair shops. That he did not have power to employ these men, and only reported them when they failed or neglected or refused to do their work. That all the crew saw the condition of the damaged cars when they went to move them to the repair shops, and that he called his crew's attention, ²¹⁴ and warned them to be careful, so that no one might get hurt in handling them, for there were no drawbars on the ends of these cars, and one of them extended out on one side so far that it would not clear a car on the track beside the one they were on [that is track No. 11], the projection being about a foot [meaning farther than usual], caused by the telescoping of one car into and over another. That there were three of the damaged cars (two baggage and one mail car), and these were in a train—first one of the cars, and then two, one in and on the other—these making the projection, and all were pushed by an engine and tender behind. Witness had informed his crew that they were going to get the three cars and put them on No. 8 track [the repair track], and he said also that they had made room for these cars on this track before they went after the cars on the other track; that as they were going up the main track, Dalton and the others of the crew were talking about the wreck in which these cars had

been wrecked the day before, and asking how each would have felt had he been in it. In the midst of this conversation, which made all of them somewhat nervous, we infer, in view of the very bad condition of the cars upon which they were then riding, the foreman, Streeter, who was sitting on the front platform of the front car, told Dalton, seated on a step below him, to move and give him room as he might have to jump at any time. These two were on the side of the semaphore pole, and the others were on the other side and elsewhere.

From this testimony, which is undisputedly true, it is impossible to escape the conclusion that, in the control and management and running of these cars and the labor of this crew, Streeter was not a fellow-servant with the others, but a vice-principal. Under the old rule, the principal test—the one most relied on and most frequently called into requisition—was whether or not the one employé had the authority to employ and discharge the others, and under that rule Streeter would have, very probably, been held to be a fellow-servant with the others, for he says himself that he had no power to employ or discharge the others of the crew. But, even before the passage of the "fellow-servant act," this court, in the case of *Bloyd v. 215 Railway Co.*, 58 Ark. 66, 41 Am. St. Rep. 85, had advanced a step toward abandoning the old rule, and made a test of the relation existing between servants and the master and servants quite different—a test quite in keeping with the spirit of the fellow-servant act, which had already been passed when the *Bloyd* case was decided, but had not been passed when the cause of action in that case accrued. The first section of the fellow-servant act, approved February 28, 1893, and which governs the case at bar, reads as follows, viz.: "That all persons engaged in the service of any railroad corporations, foreign or domestic, doing business in this state, who are intrusted by such corporation with the authority of superintendence, control, or command of other persons in the employ or service of such corporation, or with the authority to direct any employé, are vice-principals of such corporations, and are not fellow-servants with such employés." Certainly, Streeter was such a person as in the act described as a vice-principal, for he had either superintendence, control, or command of the others, and the authority to direct them in their work.

This being true, it follows that there was no reversible error in the giving of the first, second, and third instruction

asked by the plaintiff, which in effect submitted the question to the jury on the evidence.

Quoting from the testimony of Streeter further: "I do not suppose I had finished my sentence [referring to his direction to Dalton to move so as to leave him room to jump as aforesaid] until Dalton said he would get off right away; and, just as he was getting off, the second car hit the semaphore pole, and the semaphore pole hit him. There didn't seem to be any time from the time he jumped until the pole struck him. It was all done in a second's notice. The front car had passed the pole. This was the car that the other was driven into [meaning the car that struck the pole]. The entire car had not passed [meaning, I presume, the front car]. It was the side of the second car that hit the pole. The second and first cars were telescoped into each other. [I presume the meaning is the first and second, counting as they would be going forward. They were now going backward.] The first and second cars were not full length. We were only hauling ^{was} about two and one-half cars by one being telescoped into the other; these cars were about the length of a car and a half. I don't remember whether they had four tracks or not. It was fifteen feet back on the side of these cars that the pole was struck. The cars were kind of creaking, as any wrecked cars would do." On this and similar evidence on this point, the court gave the fourth instruction asked by the plaintiff, which reads as follows, viz.: "If the jury believe that, at the time the deceased jumped from the car, the appearances of danger to him were sufficient to justify a person of reasonable firmness and prudence in believing that his safety required him to jump from the car in order to escape the impending danger, then the fact that his death resulted from injuries received in making such jump will not defeat the plaintiff's right to recover in this action; and this is so notwithstanding that the jury may further believe that deceased might have escaped unhurt had he made no effort to leave said car." This instruction propounds a doctrine of universal application to cases of passengers, and has been recognized by this court, whenever necessary, to the exoneration of passengers from the charge of contributory negligence when acting in emergencies: *Railway Co. v. Murray*, 55 Ark. 248, 29 Am. St. Rep. 32; *Railway Co. v. Maddry*, 57 Ark. 306.

So far as I have been able to ascertain, we have not been heretofore called upon to consider it as applied to employes'

cases. It is evident that there is or may be a difference between the two classes of cases. A passenger, in his proper place on a train, is more or less helpless to protect himself from injuries resulting from the running of the train, is somewhat at the mercy of the carrier, while the same is not usually true, not always true, at least, as to an employé, for he is a factor, or may be, in operating the train, and, besides, is by training and habit better able to protect himself than a passenger, and withal has by his contract assumed many risks that a passenger does not assume. Moreover, a carrier is bound to exercise the greatest care to protect a passenger, while a master is only required to exercise ordinary care to protect his servant. But, in cases where these differences do not intervene to affect the very right of them, then there does not seem to be any good reason in ²¹⁷ making a substantially different rule in the one case from that applied in the other.

In other jurisdictions, the following statement is very generally supported as the proper rule, viz.: "While it is a general rule that the servant has no claim on the master for damages for an injury received by voluntarily assuming to do something which the master did not employ him to do, yet, in the case of emergency, he may, of his own volition, step outside of the line of his usual duties; and if this departure is only such as the necessities of the case fairly and reasonably call for, keeping in view the character of the work he is called upon to do, it will not of itself defeat a recovery of damages in case he is injured. Whether he is guilty of negligence is a question for the jury, and his conduct must be tried in the light of all the surroundings": *Barry v. Hannibal etc. Ry. Co.*, 98 Mo. 62, 14 Am. St. Rep. 610; *Smith v. Wrightsville etc. Ry. Co.*, 83 Ga. 671; *Austin etc. Ry. Co. v. Beatty*, 73 Tex. 598; *Wynn v. Central Park etc. Ry. Co.*, 133 N. Y. 575.

This rule is substantially the same as that of a passenger, where the servant is without fault; and the instruction under consideration is not erroneous, but substantially correct.

The deceased, like the foreman and probably the others of the crew, had grown somewhat nervous over the appearance of the wrecked cars, and began to be fearful of some injury from them, and on a suggestion from the foreman to move on his seat so as to make room for him (the foreman), as it might soon be necessary for him to do so, concluded that it was safer to get on the ground, did so, and was injured by an unfore-

seen occurrence. The jury had good ground to exonerate him from the charge of contributory negligence.

It is contended that the doctrine of "assumed risks" is to be applied to this case, and, when so applied, would defeat a recovery by the plaintiff. The doctrine of "assumed risks" may be thus epitomized, viz.: "Where one voluntarily enters into a contract of hiring with a railroad company, he assumes all the risks and hazards ordinarily and usually incident to such employment, and will be presumed to have contracted with reference to such risks and hazards." But, while an employé assumes ^{all} the risks incident to the service he enters, he does not assume a risk created by the negligent act of the master, and only such risks as he knows to exist or may know by ordinary care. It is unnecessary to cite authorities in support of these elementary propositions.

The sole question of any difficulty of solution in this case is, therefore, one of fact which the jury has settled; that is, whether or not the defendant, acting through its vice-principal and representative, was guilty of negligence as charged in the complaint, and, if so, was that negligence the proximate cause of the death of Dalton. Some of us are of the opinion that the defendant did not exercise the necessary care in measuring the distance from the track to the point where the semaphore pole was erected, and that it was negligent in erecting the same so near to the track as that it was struck and knocked down by this car—a fact of itself showing that it was too near, as it appears to them. Let that be as it may, the other act of negligence charged is more apparent, that is, the act of running these wrecked cars at the rate of five or six miles an hour, when it was a matter of apprehension to the foreman as well as to the deceased, and perhaps the others, that they were liable to collapse and fall upon them on the front platform at any moment. If there was apprehended danger of the wrecked cars falling toward the front, there was equal reason to apprehend that they would fall laterally or careen so much as possibly not to pass objects along the side of the track. The apprehension was felt in the one case the more sensibly because the personal safety of the parties was directly involved, but the apprehension of the danger of the wrecked car careening, although it did not develop altogether as apprehended, was nevertheless the moving cause of the deceased's jumping to the ground. Under the circumstances, this could not be attributed to him as contributory negligence.

These are considerations that might reasonably have influenced the jury in arriving at their verdict. So that we do not feel authorized to disturb the verdict.

The judgment is therefore affirmed.

Riddick, J., dissenting.

Battle, J., absent.

VICE-PRINCIPAL.—A FOREMAN OF A GANG of men, vested with the supervision of a particular work, and with power to direct and control the men under him, is a vice-principal: See the extended note to *Mast v. Kern*, 75 Am. St. Rep. 613, on who is a vice-principal.

RAILROADS.—A RAILWAY EMPLOYEE ASSUMES the ordinary risks incident to the service: *St. Louis etc. R. R. Co. v. Irwin*, 87 Kan. 701, 1 Am. St. Rep. 266; *Louisville etc. R. R. Co. v. Stutta*, 105 Ala. 368, 53 Am. St. Rep. 127. But he does not assume the risk of the negligence of his employer: *Chicago etc. R. R. Co. v. Knelrim*, 152 Ill. 458, 43 Am. St. Rep. 259; *Terre Haute etc. Ry. Co. v. Williams*, 172 Ill. 379, 64 Am. St. Rep. 44.

NEGLIGENCE—DUTY OF PERSON IN PERIL.—When a person is placed in peril through the negligence of another, he need only make an effort to protect himself, and if he makes a mistake and errs in judgment, he cannot be said to be guilty of negligence: *Blackwell v. Lynchburg etc. R. R. Co.*, 111 N. C. 151, 82 Am. St. Rep. 786. See, too, *Consolidated Traction Co. v. Scott*, 58 N. J. L. 682, 55 Am. St. Rep. 620.

DOSTER v. MANISTEE NATIONAL BANK.

[67 Arkansas, 325.]

FRAUDULENT CONVEYANCES—LIEN OF JUDGMENT. A judgment creditor has no lien upon lands fraudulently conveyed by the debtor prior to the rendition of his judgment. Hence, a junior judgment creditor who first files his bill to set aside the fraudulent conveyance secures a first lien upon such property superior to that of any other judgment creditor.

FRAUDULENT CONVEYANCES—VOIDABLE ONLY.—Under a statute which provides that every conveyance of an interest in lands made to hinder, delay, or defraud creditors shall be void as against creditors and purchasers, such conveyance is not void per se, but only voidable. It carries the legal title subject only to defeasance by the creditors and purchasers.

Cockrill & Cockrill, for the appellant.

Dodge & Johnson, Carroll & Pemberton, and D. H. Cantrell, for the appellee.

326 WOOD, J. This suit is between judgment creditors of George R. Brown to determine which of them has the superior right to certain lots in Little Rock. Appellant obtained judgment against Brown May 16, 1893, and had *scire facias* issued and served to revive same February 11, 1896, and judgment of revivor was rendered May 25, 1896. Appellee obtained its first judgment against Brown June 7, 1893, and the second May 10, 1895. Execution was issued on these October 29, 1895, and same was returned *nulla bona*. On the same day (October 29, 1895), appellee filed a complaint for itself alone, to uncover certain property, including the lots in controversy alleging that same had been conveyed by Brown in fraud of creditors. On December 21, 1896, appellant filed his intervention in appellee's suit, setting up his judgment lien, alleging that he was willing to contribute to the expenses of the action, that Brown was insolvent, and that an execution against him would be of no avail, and asking to be allowed to share in the proceeds of the creditor's bill filed by appellee. Appellee's answer to the intervention of appellant alleged a specific lien on the property by reason of the complaint filed by it, and asked that the rights of appellant under his judgment be 327 subordinated to its lien. At the time of the filing of appellant's intervention, appellee agreed with him that the assistance of his attorney in the prosecution of the creditors' suit would be waived, and that in the contest between them it would be considered as though appellant had rendered all the assistance that the law would require. Appellant filed a written assumption of his share of the costs. It was understood that all controversy between appellant and appellee as to their respective rights in the proceeds, if any, of the creditor's suit against Brown et al. should be postponed until that issue was settled. No execution was issued by appellant until long after the present suit had been brought, and appellant's intervention had been filed. The decree on the original complaint and answer subjected the lots in controversy to the payment of Brown's debt. Of these lots some were conveyed before and some after the rendition of the judgments.

The appellant contends that, as senior judgment creditor, he is entitled to have applied to the satisfaction of his judgment the entire proceeds from any sale that may be had of the lots which were fraudulently conveyed prior to the rendition of the judgment of either party. He grounds his contention upon the following sections of Sandels & Hill's Digest:

"Sec. 4204. A judgment in the supreme, chancery, or circuit court of this state or of the district or circuit court of the United States shall be a lien on the real estate owned by the defendant in the county in which the judgment was rendered from the date of its rendition."

"Sec. 3049. The following described property shall be liable to be seized and sold under any execution upon any judgment, order, or decree of a court of record: . . . 6. All real estate, whether patented or not, whereof the defendant, or any person for his use, was seised in law or equity on the day of rendition of the judgment, order, or decree whereon execution issued, or at any time thereafter."

Appellant also relies upon the following decisions of this court: Ringgold v. Waggoner, 14 Ark. 69; Apperson v. Ford, 23 Ark. 746, 759; Bennett v. Hutson, 33 Ark. 762; Hershy v. Latham, 46 Ark. 542; Wormser v. Merchants' Nat. Bank, 320 49 Ark. 117; Cohn v. Hoffman, 50 Ark. 108; Stix v. Chaytor, 55 Ark. 116, 123; McNeill v. Carter, 57 Ark. 579.

The statute gives a lien from the day of the rendition of the judgment upon the real estate owned by the defendant, or whereof he or any person for his use is seised in law or equity. Where a debtor has fraudulently conveyed his real estate before any judgment is rendered against him, or has procured same to be fraudulently conveyed to another, he is not in any sense the owner of such real estate, nor is he thereafter seised in law or equity of such real estate, nor is the grantee seised for his use. The authorities generally recognize the fact that a deed to land, although fraudulently conveyed, carries the title of the grantor. The deed is good inter partes: Meux v. Anthony, 11 Ark. 411, 52 Am. Dec. 274; Millington v. Hill, 47 Ark. 309; Bell v. Wilson, 52 Ark. 171; Bump on Fraudulent Conveyances, secs. 432, 433; Wait on Fraudulent Conveyances, secs. 395-399; 8 Am. & Eng. Ency. of Law, 1st ed., 771, and authorities cited by these.

The fraudulent grantee gets a title that he can alienate, and by so doing confer a perfect title upon his alienee, if the alienee be an innocent purchaser for value. This is the doctrine of our own court, and of nearly all the states: Ringgold v. Waggoner, 14 Ark. 69; Stix v. Chaytor, 55 Ark. 116, 123; Wait on Fraudulent Conveyances, sec. 386; Bump on Fraudulent Conveyances, sec. 492, and numerous authorities cited.

Of course, this would not be possible if the conveyance of the fraudulent grantor did not carry the title to the fraudulent

grantee. It follows, then, logically and necessarily, that, under this statute alone, the judgment creditor has no lien upon lands fraudulently conveyed by the debtor prior to the rendition of his judgment. This construction certainly conforms to the plain and unequivocal language of the act. Why should we so change and extend it as to make it apply to lands which the defendant at the time of the rendition of the judgment did not own, and of which neither he, nor anyone for him, was seised in law or equity? To so construe it would be judicial legislation, and that, too, with unjust results, because "when the law gives priority, equity will follow it": *Senter v. Williams*, 61 Ark. 189; and, in passing upon the rights of judgment creditors to lands fraudulently conveyed ³²⁰ prior to the rendition of the judgments, the effect would be to ignore that old and excellent maxim of equity, *Vigilantibus, non dormientibus, sequitas subvenit*, and to declare in favor of those merely prior in time, although ever so unequal in diligence. Such a doctrine would encourage fraudulent judgments. It would impose oftentimes upon the junior judgment creditor the expensive, but still thankless and bootless, task of uncovering assets, which, by his diligence, he had discovered, for the benefit of another, or else the disagreeable experience of seeing the fraudulent debtor concealing and appropriating to his own use assets which justly belonged to his creditors.

But, while the language of the statute itself is plainly against a construction which would lead to such inequitable consequences, appellant, to sustain his contention for a lien, would have us construe section 3472 of *Sandels & Hill's Digest* as in *pari materia*, and to hold that his judgment was a lien on Brown's estate, just as though the legal title had been all the time in Brown. The section referred to is as follows: "Every conveyance . . . of any estate or interest in lands, made or contrived with the intent to hinder, delay, or defraud creditors or other persons of their lawful actions, damages, forfeitures, debts, or demands, as against creditors and purchasers, prior and subsequent, shall be void." If the latter statute is to be taken as in *pari materia* with the statute under consideration as between judgment creditors and their debtors, still that cannot aid appellant. Ever since the passage of 13 Elizabeth, after which our statute as to fraudulent conveyances was modeled, the word "void," as therein used, has generally been held to mean "voidable": *Mew's English Case Law Digest*, 338, and authorities collected; *Pomeroy on Contracts*, sec. 282,

and authorities cited; Bump on Fraudulent Conveyances, *see* 451, and authorities cited in note 1.

As we have seen *supra*, such is the view of our own court; and this is undoubtedly correct, for every fraudulent conveyance carries the legal title subject only to defeasance by creditors and purchasers. Such conveyance is not void *per se*, even as between the debtor and creditor; much less between creditor and creditor. Even as between the debtor and creditor, if the ³³⁰ creditor condones the fraud, and takes no step to avoid the conveyance, it stands forever as a divestiture of the title of the debtor. Nor will the mere rendition of a judgment in favor of the creditor against the debtor avoid the latter's fraudulent conveyance. The judgment simply fixes the amount of the debtor's liability for which is subject the property he actually owns, or of which he, or some one for him, is seized and possessed.

Nor do courts of law annul and set aside fraudulent conveyances. Some process, after judgment at law is rendered, is necessary in order to fix and secure a lien upon property that has been fraudulently conveyed, and to uncover it for the judgment creditor.

In some jurisdictions the creditor has choice of three remedies: "1. He may sell the debtor's land upon execution, and leave the purchaser to contest the validity of the defendant's title in an action of ejectment; or 2. He may bring an action in equity to remove the fraudulent obstruction to the enforcement of his lien by execution, and await the result of the action before selling the property; or 3. He may, on return of an execution unsatisfied, bring an action in the nature of a creditor's bill to have the conveyance adjudged fraudulent and void as to his judgment, and the land sold by a receiver or other officer of the court, and the proceeds applied to the satisfaction of the judgment, as, in the case of equitable interests, the debtor's assets are reached and applied." So it is said by the supreme court of Minnesota in *Jackson v. Holbrook*, 36 Minn. 494, 1 Am. St. Rep. 683; also in *Erickson v. Quinn*, 15 Abb. Pr., N. S., 166.

Those states which hold, under statutes similar to ours, that a judgment is a lien upon property fraudulently conveyed prior to its rendition may very properly and consistently adopt the first of the above-named remedies, to wit, to sell the debtor's land upon execution, and leave the purchaser to contest the validity of the defendant's title in an action of ejectment. But

it is apparent that, if the conveyance is to be treated, upon the simple rendition of a judgment, as though it had never been made, and the property, notwithstanding such conveyance, is still the debtor's, then it is inconsistent to say, and idle and ³⁸¹ useless to hold, that the creditor may elect to adopt the above remedy, or go into chancery "to remove the fraudulent obstruction to the enforcement of his lien by execution, or bring a creditor's bill to have the conveyance adjudged fraudulent and void as to his judgment." For if the property so fraudulently conveyed is nevertheless still owned and seised by the debtor, then an execution on the judgment at law will reach it, and there is in fact no fraudulent obstruction to the enforcement of his lien by execution, and there is no necessity for a creditor's bill to have the conveyance adjudged fraudulent and void as to his judgment, because there is nothing that obstructs the enforcement of such judgment at law.

The courts which fall into such glaring incongruities in prescribing the remedies under this statute are no more discriminating, logical, and consistent when discussing the principles upon which the rights are founded giving rise to the remedies. All the authorities which hold that a judgment creditor has a judgment lien upon land which has been fraudulently conveyed by the debtor prior to the rendition of the judgment are grounded upon the egregious fallacy that a fraudulent conveyance is not voidable merely, but absolutely void: *Slattery v. Jones*, 96 Mo. 216, 9 Am. St. Rep. 344; *Jackson v. Holbrook*, 36 Minn. 494, 1 Am. St. Rep. 683; *Freeman on Executions*, sec. 136, and authorities there cited; *Jacoby's Appeal*, 67 Pa. St. 434; *Bump on Fraudulent Conveyances*, sec. 530.

That a lien may be fixed by the levy of an execution on lands which have been fraudulently conveyed by a debtor prior to the rendition of the judgment against him, and that such lien may be made productive by a sale of the property under the writ, without seeking the aid of chancery, as is held by some authorities (*Smith v. Osgood*, 46 N. H. 178; *Burnett v. Handley*, 8 Ala. 685; 1 *Freeman on Executions*, sec. 207), does not at all conflict with the idea that there is no statutory judgment lien on such property. We must discriminate properly between the statutory judgment lien and the lien acquired by virtue of an execution issued under a general judgment, as in the numerous cases cited by Mr. Freeman in note 1 to section 136 of his work on Executions. Mr. Herman in his work on Executions, at page 265, says: "Where the judgment is a ³⁸² lien on lands,

there can be no independent lien acquired by the issue of an execution. But where land is seized by virtue of a judgment, which is no lien, the execution becomes a lien." As was said by the supreme court of Pennsylvania: "A lien is, indeed, a necessary and inseparable incident of seizure in execution, except where the execution is merely instrumental in enforcing a prior and superior lien by judgment. In such case it never was supposed by the legislature, or the profession, that a judgment and an execution on it had each a distinct and independent lien": *Davis v. Ehrman*, 20 Pa. St. 256. We maintain that there is no statutory judgment lien on lands which have been fraudulently conveyed before the rendition of judgment, the debtor no longer owning, or being possessed or seized of, such property, either in law or equity. Whether liens may be acquired by executions on judgments against such debtors, and in various other ways, it does not boot us here to discuss. We do not hesitate, however, to say that the method of attacking a fraudulent conveyance of land by levying an execution on same, and then proceeding to sell same under the writ, leaving the purchaser to contest the validity of the conveyance in an action of ejectment against the fraudulent vendee, is not to be encouraged. It is circuitous and cumbersome, and at last leaves a cloud upon the record title; for a court of law can never cancel and set aside a fraudulent conveyance. As was held by this court in *Sale v. McLean*, 29 Ark. 612, quoting from syllabus: "Where a judgment creditor seeks to subject land which the debtor has conveyed fraudulently, the proper practice is to exhaust the process of the court, and apply to a court of equity for aid before a sale."

We are not without abundant and excellent authority to support the construction for which we contend. Section 13 of 1 and 2 Victoria, chapter 110, provides, in effect, that a judgment against any person shall operate as a charge upon all lands "of or to which such person shall, at the time of entering up such judgment, or at any time afterward, be seized, possessed, or entitled for any estate or interest whatever at law or in equity," etc. The statute under consideration was modeled after ~~333~~ this. In *Beavan v. Earl of Oxford*, 6 De Gex, M. & G. 514, Lord Chancellor Cranworth says: "The question which was reserved for consideration in this case relates to the priority of three judgment creditors of the late Lord Oxford, . . . and the point is whether, by virtue of the statute of Elizabeth alone, or by virtue of it combined with the statutes of the present

queen [Victoria], these judgment creditors have or have not a right against the parties claiming under a voluntary settlement executed by Lord Oxford in the year 1838." After holding that a judgment creditor is not a purchaser under the statute of 27 Elizabeth concerning fraudulent conveyances, and not entitled to protection as such against a prior voluntary conveyance, the lord chancellor proceeds as follows: "Now, what did the legislature mean to do by that enactment? In the first place, they meant to make the judgment directly operate as a charge. But a charge on what? I apprehend that there was no principle inducing them to mean, and that the words do not represent them as having meant, to give the judgment creditor any right except against his debtor; that is, the judgment was to have the effect of a charge on that which was the property of the debtor. That, I think, is manifest from the words used. The judgment is to operate on land of which the debtor is seised," etc. Other concurring opinions were delivered by the lord justices. The case is a very instructive one, and is an early and able vindication of the exact construction for which we here contend: See, also, *Eyre v. McDowell*, 9 H. L. Cas. 619.

In *Dolphin v. Aylward*, L. R. 4 Eng. & Ir. App. 486, it is held that, "where a voluntary settlement has been made, subsequent judgment creditors of the debtor cannot acquire rights in derogation of it which the settler himself would not have possessed." At page 500, the lord chancellor said: "And it is quite settled that a judgment creditor can take no interest whatever, either legal or equitable, beyond what he acquires from the debtor; such an interest, in fact, as the debtor himself could give, and no other."

Mr. Freeman, in the fourth edition of his work on Judgments, which is later than the second edition of his work on Executions, ²³⁴ which he cites, says: "In some of the states a judgment is a lien against lands fraudulently conveyed for all purposes, and cannot be displaced in favor of any junior judgment or other lien, the holder of which first proceeds either at law or in equity to seek satisfaction out of the property so conveyed." "But," he continues, "we think the better rule is that one who has not, by levy or otherwise, taken any further steps to obtain satisfaction out of property fraudulently transferred has no lien thereon. . . . On the contrary, the creditor who first proceeds in equity to reach property fraudulently transferred thereby obtains a right to priority, to which the claims

of other judgment creditors, whether prior or subsequent, must give precedence": Freeman on Judgments, sec. 350, p. 640.

In *In re Estes*, 3 Fed. Rep. 134, Judge Deady, after a most satisfactory review of authorities pro and con, sums up the whole matter as follows: "In my own opinion, the lien of a judgment which is limited by law to the property of or belonging to the judgment debtor at the time of the docketing does not, nor cannot, without doing violence to this language, be held to extend to property previously conveyed by the debtor to another by deed valid and binding between the parties. A conveyance in fraud of creditors, although declared by the statute to be void as to them, is nevertheless valid as between the parties and their representatives, and passes all the estate of the grantor to the grantee, and a bona fide purchaser from such grantee takes such estate, even against the creditors of the fraudulent grantor, purged of the anterior fraud that affected the title. Such a conveyance is not, as has been sometimes supposed, entirely void, but is only so in a qualified sense. Practically, it is only voidable, and that at the instance of creditors proceeding in the mode prescribed by law, and even then not as against a bona fide purchaser": See *In re Estes*, 6 Saw. 459. Other authorities are *Rappleye v. International Bank*, 93 Ill. 396; *Boyle v. Maroney*, 73 Iowa, 70, 5 Am. St. Rep. 657; *Howland v. Knox*, 59 Iowa, 46; *Bridgman v. McKissick*, 15 Iowa, 260; *Black on Judgments*, sec. 455; *Smith v. Lind*, 29 Ill. 27.

The learned counsel for appellant says that "appellant had a prior and paramount lien over appellee on all lands acquired ³³⁵ by Brown before the rendition of appellee's judgments, although the title was fraudulently taken in the name of other persons," and he contends that this doctrine is established by numerous cases in this court, beginning with *Ringgold v. Waggoner*, 14 Ark. 69, and ending with *Stix v. Chaytor*, 55 Ark. 116. With due deference, we think counsel are mistaken both as to what the law is, and what we have decided. Brown, as we have endeavored to show, no longer had any interest, either legal or equitable, in lands after he, as the owner in fee, had fraudulently conveyed them. Nor did he have any equity in lands purchased by him whereof the legal title was taken in the name of another, in order to defraud creditors. This was, in effect, the same as though the legal title had first been taken in the name of the debtor, and thereafter he had transferred same to another to defraud creditors. Hence all we have said applies to such conveyances. But those authorities which hold that a

judgment is a lien on the land which the debtor has previously conveyed in fraud of creditors, upon the theory that such conveyance is void, and is to be treated as though it never had been made, leaving the legal title still in the debtor, are not applicable to conveyances where the legal title never has been in the debtor. For, says Mr. Freeman, "if the transfer were treated as void, the title would remain in the person of whom the purchase was made; and this would be of no advantage to the creditors. The transfer must, therefore, be treated as valid, and as transmitting the legal title to the person named in the deed. This legal title cannot be reached by the levy of an execution against the debtor, because he has never owned it. The creditor must, therefore, resort to equity, except in a few states where statutes have been enacted to enable them to reach it at law": 1 Freeman on Executions, sec. 136, p. 137.

The only theory for holding, under the statute, that a judgment is a lien upon lands to which the debtor never held the legal title, but which were purchased by him and the title taken in the name of another to defraud creditors, is that of resulting trusts. But this theory is erroneous. For where a conveyance is made to defraud creditors, a resulting trust never arises in favor of the fraudulent debtor. He has no interest ^{see} thereafter that can be asserted either in law or equity: *Heinz v. White*, 105 Ala. 670; *Proseus v. McIntyre*, 5 Barb. 425; *Vanzant v. Davies*, 6 Ohio St. 52; *Cutler v. Tuttle*, 19 N. J. Eq. 549; *Glidewell v. Spangh*, 26 Ind. 319. Where property is conveyed without consideration, with a view of defrauding creditors, no trust will result: 1 Beach on Trusts and Trustees, sec. 125; 1 Beach's Modern Equity Jurisprudence, sec. 217; 1 Perry on Trusts, sec. 151; *Miller v. Davis*, 50 Mo. 572; *Baldwin v. Campfield*, 8 N. J. Eq. 891.

As to our own decisions, while there are expressions in some of the cases which seem to support the contention of appellant, we cannot find that the question we have here, involving the priorities of judgment creditors, has ever been passed upon.

In *Ringgold v. Waggoner*, 14 Ark. 69, Ringgold filed his complaint in chancery to set aside certain alleged fraudulent conveyances from John W. Waggoner to his brother Edmond P. and from Edmond P. to one Burr. The complaint alleged, in substance, that Ringgold had sued John W. Waggoner at law for debt; that while this suit was pending, and before judgment, John W. sold to Edmond P. the land in controversy, and that Edmond P. in turn sold to Burr, and that all these con-

veyances were for the purpose of defrauding Ringgold; that Burr had been notified, before getting his deed from Edmond P., that he (Ringgold) had obtained judgment against John W. Waggoner, which was a lien upon the land in question, by reason of the fraudulent conveyance from John W. to Edmond P., and that he intended to have the land sold under his judgment as the property of John W., and that Burr in other ways had notice that the conveyance from John W. to Edmond P. was fraudulent; that, notwithstanding this notice, Burr had colluded with John W. and Edmond P. to enable John W. to defraud his creditors; that, the judgment at law in favor of Ringgold remaining unsatisfied, he had execution issued and levied upon the land as the property of John W. Waggoner, and same was sold under such execution, and he (Ringgold) became the purchaser thereof; and that one Hooper, acting under the authority of Burr, was then in possession. The prayer was for a cancellation of all the conveyances, and ³³⁷ for possession, etc. Burr answered that he was an innocent purchaser. The court, discussing the character of the conveyance from John W. to Edmond P., said it, as "against the complainant, was void, and the judgment subsequently obtained by him became a lien upon the land as the property and estate of the fraudulent grantor, and the complainant, by his purchase of the land under execution, acquired a valid title to it as against the parties to the fraudulent conveyance." Continuing, Chief Justice Watkins said: "The only question in the case is whether the defendant, Burr, is entitled to be protected as an innocent purchaser"; and that was, indeed, true, for, the complaint being in equity to set aside fraudulent conveyances, it was not at all necessary for the decision of the case that the court should decide that complainant's judgment was a lien on the land, nor that he acquired a valid lien as against the parties to the fraudulent conveyance by his purchase under execution. That was all true, even if the judgment was not a statutory lien. The creditor had an equitable lien.

Stix v. Chaytor, 55 Ark. 116, was also a suit in chancery by a judgment creditor to set aside certain conveyances alleged to be fraudulent. So much of the case as is pertinent here relates to a purchase of land by Chaytor, he paying the purchase money, and having the lands conveyed to his wife in order to defraud creditors. Speaking of this phase of the case, Judge Mansfield, for the court, said: "The purchase in the name of his wife can stand on no better footing; for the law regards

it as in effect a conveyance from himself. But where land is thus purchased by a husband and conveyed to his wife in fraud of his creditors, the latter would not be benefited by treating the conveyance to her as void, since the title would then remain in the grantor. And equity will, therefore, treat the wife in such case as trustee for the benefit of the husband's creditors. Applying this doctrine to the present case, an estate in the lands purchased of Feazel resulted to Chaytor on the execution of the deed to his wife. The estate which he thus acquired was subject to sale on execution under our statute, and the purchaser would have taken, not only the beneficial interest in the lands, but also the legal title. It follows, necessarily, we ³²⁸ think, that the lands in controversy, while held by Mrs. Chaytor, were subject to a lien existing by virtue of the plaintiffs' judgment. . . . Such a lien could not, however, be asserted against bona fide purchasers or encumbrancers." Here again it will be seen that it was wholly unnecessary to decide that an estate in the lands resulted to Chaytor on the execution of the deed to his wife, and that such estate was subject to execution under our statute, and that the purchaser thereunder acquired the legal title, and that the lands, while held by Mrs. Chaytor, were subject to a lien existing by virtue of plaintiff's judgment. These were not, in fact, germane to the issue, the only question before the court being, Was the conveyance, as between the creditor and his debtor, fraudulent, and, if so, still were certain parties innocent purchasers? If the court meant by these dicta to hold, where a purchase of land is made by a debtor, and the conveyance is made to his wife at his instance in order to defraud creditors, that an estate results to the debtor upon the execution of the deed to his wife, and that a judgment rendered at law after such conveyance is a statutory lien upon such land, then we do not hesitate to declare all such dicta as unsound, and we will not follow them. Where a fraudulent conveyance is set aside by creditors, and the land is thereafter sold to satisfy their claims, should there be any residue after paying their debts, such residue does not go to the debtor, but to his fraudulent vendee. This shows the debtor has no estate in the land upon such conveyance: Bump on Fraudulent Conveyances, sec. 450, and authorities cited.

We can easily see, as Judge Mansfield says, how the wife, or the fraudulent vendee, is held as a trustee for the creditors. But how she could be a trustee, so as to vest any estate, legal or equitable, in the debtor, is an altogether different matter.

Probably both of these learned judges, after all, only had in view the equity which creditors have by proper proceedings to subject land which has been fraudulently conveyed to the payment of their debts. That creditors have such an equity is unquestioned, but they do not have it by virtue of the statute, but independent of it. Says Mr. Pomeroy: "In carrying out the general principle of trusts for the purpose of working out ultimate justice, and reaching property where the legal title has been parted with, and is beyond the scope of legal process, a constructive trust is said to arise in favor of judgment creditors with respect to the property of their debtors, which has been transferred with the intent to defraud the creditors of their rights, or of which the legal title is vested in a third person with a like fraudulent intent, or which is of such a nature that it cannot be taken by execution upon judgments in legal actions." Continuing, in the note, he says: "The trust is in reality one in name alone; the creditor's right to reach the debtor's property is in no true sense an interest in that property; it is at most only an equitable lien on the property": 2 Pomeroy's Equity Jurisprudence, 1057.

In the other cases cited—McNeill v. Carter, 57 Ark. 579, Cohn v. Hoffman, 50 Ark. 108, and Wormser v. Merchants' National Bank, 49 Ark. 117—not only is the question of priorities not involved, but in each of these there might be said to be some equity remaining in the judgment debtor, bringing the case within the express terms of the statute.

Hershy v. Latham, 46 Ark. 542, and Apperson v. Ford, 23 Ark. 746, have no bearing that we can see in favor of appellant's contention. After a careful analysis and comparison of our own cases and all the other authorities at our command, we are of the opinion that judgment creditors have no lien by virtue of the statute upon lands which have been fraudulently conveyed prior to the rendition of their judgments, and that at least the proper, if not the only, remedy for them in such cases is to go into equity to uncover such conveyances, and that the creditor who exercises superior diligence in that regard by first bringing his suit and proceeding to uncover such assets is entitled to the proceeds. This seems to us to be eminently just, for intrinsically one creditor's judgment, fairly obtained and based on a valid claim, is as meritorious as another. There is no merit in the mere time of rendition, for that depends often only upon the time of maturity of the debt. Besides, the one first in time is not prevented from being first also in diligence.

The chancellor held that appellee was entitled to the proceeds ²⁴⁰ of the sale of the lands fraudulently conveyed prior to the rendition of the judgment of either party, but for different reasons than those we announce. In the view we have taken, it becomes unnecessary to discuss the reasons of the chancellor. The proceeds of the lands which were fraudulently conveyed after the rendition of the judgments he also gave to appellee, because of its superior diligence in first bringing its suit to uncover same. In this we think he was entirely correct, for the reason stated, and because in other respects the appellee showed far greater diligence. Finding no reversible error, the decree of the Pulaski chancery court is affirmed.

Battle and Riddick, JJ., dissent.

A FRAUDULENT CONVEYANCE IS NOT VOID, but merely voidable at the suit of a creditor: *Bradtfeldt v. Cooke*, 27 Or. 194, 50 Am. St. Rep. 701.

FRAUDULENT CONVEYANCE.—A JUDGMENT IS NOT A LIEN on real estate which the judgment debtor conveyed, before the judgment was rendered, to defraud his creditors. But if they subsequently obtain judgments against him, their filing bills to set aside the conveyance as fraudulent, and the obtaining of service thereon, create equitable liens on the land in the order in which the bills are filed and the service obtained: *Union Nat. Bank v. Lane*, 177 Ill. 171, 69 Am. St. Rep. 216. Compare *First Nat. Bank v. Maxwell*, 123 Cal. 260, 69 Am. St. Rep. 64.

ARKANSAS FIRE INSURANCE COMPANY v. WILSON

[67 Arkansas, 553.]

CONTRACTS.—THE INTERPRETATION OR CONSTRUCTION of a contract is a question of law for the court.

INSURANCE CONTRACT—FORFEITURE.—A clause in an insurance policy which contains a forfeiture is strictly construed against the insurer.

INSURANCE—AVOIDING POLICY—CHANGE OF INTEREST.—Under the provisions of a fire insurance policy that it should be void "if the interest of the assured became other than the entire, unconditional, unencumbered, and sole ownership," the policy is not avoided because the insured entered into an executory contract in writing to sell, where no deed passed and no possession was given.

Am. St. Rep. Vol. LXXVII.—9

Suit to recover on a fire insurance policy.

J. H. Harrod, for the appellant.

John G. B. Simms, E. A. Bolton, J. T. Young, and Sam Frauenthal, for the appellee.

555 WOOD, J. The propositions upon which appellant relies for a reversal are: 1. That the conditions of the policy were broken, and the policy thereby forfeited, and upon the undisputed facts the court should have directed a verdict for defendant; 2. That the court erred in not declaring that the evidence showed a sale of the property by Wilson to Dunaway; 3. That the court erred in not giving the sixth instruction asked by defendant; 4. That the court erred in refusing to permit the defendant to introduce in evidence the judgments against Wilson; 5. That the court erred in refusing to allow defendant to read in evidence the transfer of the policy to Kincheloe; 6. That the court erred in directing the jury to find a special verdict as to whether there had been a sale of the property. We will consider these in the order named.

It is contended that the policy was forfeited by a sale of the property to one Dunaway. The proof upon this proposition was substantially as follows: Dunaway testified that he bought the property from Wilson; that he wrote Mr. Wilson a letter making him an offer for the property, and received in answer the following letter:

"Pettus, Ark., May 6, 1897.

"Mr. J. G. Dunaway.

"Kind Sir: I will take your proposition in regard to my place at Conway. I would have written to you **556** sooner, but I saw Mr. Collier and Bolton and Young and they advised me to wait until I heard from the Building & Loan. So I will be up to Little Rock about next Sunday or Monday, and I will stop and see you if you are in. I told your pa that I would let you have the place at your figures. So I will see you soon.

"Yours truly,

(Signed) "J. B. WILSON."

He says he paid Wilson two dollars and fifty cents on the property when he bought it; that this payment was made on the 13th of May, 1897—two days before the fire; that on the 12th of November, 1897, Wilson tried to get him to take the money back that he had paid. He did not take possession or exercise any control over the property. On May 17, 1897, he wrote Wilson the following letter:

"May 17, 1897.

"J. B. Wilson, Esq., Pettus, Ark.

"Dear Sir: I suppose that you have heard before this that your house was burned on last Friday night. I believe pa wrote me, so I guess this will break into our trade. There was a mistake or two in the deed anyway, and I had prepared new deed for you to sign, but will not send it now until matters are settled. I understand that you have \$1,500 insurance on it; so, if you can get that, it will no doubt help you out. Pa stated that there was a man by the name of Jones in the house at the time, and that it was not known how the fire caught. Please bring the deed in with you when you come.

"Yours truly,

"J. G. DUNAWAY."

Dunaway says he supposed he used the language "your house was burned" in the letter just hurriedly, in writing same; says he had written a deed for the property, and Wilson had consented to the terms of it, but had never signed and returned it. The proposition he made Wilson was to give him one hundred dollars, and assume the mortgage that the building and loan association held, and that was the proposition he answered in the letter of May 6th. Dunaway said he never wrote the building and loan association a letter agreeing to assume the Wilson mortgage, and never told anyone representing it that he would assume the mortgage, but considered that he had assumed it. He never took any receipt for the two dollars and fifty cents he paid ⁵⁰⁷ Wilson at the time of the trade; never tried to enforce specific performance.

Wilson on this point testified that he never sold the house to Dunaway; that he borrowed two dollars and fifty cents from Dunaway, but did not accept it as payment for the house. He and Dunaway were just talking about a trade. He offered to pay the two dollars and fifty cents at one time when there were no witnesses, and at another time when he took witnesses with him, but Dunaway would not take it.

At plaintiff's request the court instructed the jury as follows: "The court instructs the jury that if you believe from the evidence that the defendant did insure the plaintiff's frame building on the lot described in the policy for fifteen hundred dollars against direct loss by fire from September 29, 1894, to September 29, 1897, and that said building was, between said dates, totally destroyed by fire, and that no condition contained in the policy of insurance was violated, then you will find for

the plaintiffs the amount for which said building was insured by said policy." And at the defendant's request, on this point, as follows: "3. You are instructed that if you find from the evidence that at any time after the issuance of the policy, and before the fire, the interest of Mr. Wilson in the insured property became other than entire, unconditional, unencumbered, and sole ownership, you will find for the defendant (except the mortgage of the plaintiff building and loan association)." But refused to grant defendant the following requests: "5. You are instructed that the evidence shows that Wilson sold the property to Julian and Sharp Dunaway, and that such sale forfeited the policy, unless you find that the defendant's agreement or consent was indorsed on the policy, or was otherwise given. 6. If you find from the evidence that, after the issuance of the policy, and before the fire, Julian and Sharp Dunaway made to J. B. Wilson a written offer to buy the property insured for one hundred dollars, and assuming the mortgage to the building and loan association, and that J. B. Wilson before the fire accepted the offer, in writing, you are instructed that this avoided the policy, unless defendant consented thereto, and plaintiffs cannot recover in this action."

The instruction given at plaintiff's request was proper, as 558 was also No. 3 given at the request of the defendant. No. 5 was properly refused. The evidence, at most, only showed an executory contract for the sale of the property. There was no sale, but only an offer on the one side and an acceptance of such offer on the other, but the absolute sale could not take place until the execution and delivery of a deed to the property. But as to whether or not the written offer of Dunaway to buy the property, and the acceptance thereof by Wilson, constituted a breach of the policy which barred recovery, was a question for the court, and not for the jury. The offer was shown to have been in writing, and the acceptance was in writing. Judge Parsons, in his chapter on the interpretation and construction of contracts, lays it down as the very first rule "that what a contract means is a question of law": 2 Parsons on Contracts, 8th ed., 492, 610, and authorities cited.

The court, then, should have granted appellant's request No. 6, supra, if an executory contract of that kind would avoid the policy, under the provision that "the policy should be void if the interest of the assured became other than the entire, unconditional, unencumbered, and sole ownership." This is the real and only serious question in the case. In proceeding to a

discussion of this provision of the policy, we must remember that such clauses are always and justly construed, when there is any doubt about the intent, with the utmost strictness against the insurer, and always with reference to their own legitimate object, i. e., the protection of the insurer against risks that are materially different from those which he has undertaken: *Smith v. Phoenix Ins. Co.*, 91 Cal. 323, 25 Am. St. Rep. 191. As Judge Dillon expresses it: "The object of the insurance company, by this clause, is that the interest shall not change so that the assured shall have a greater temptation or motive to burn the property, or less interest and watchfulness in guarding and preserving it from destruction by fire": *Ayres v. Hartford Fire Ins. Co.*, 17 Iowa, 176, 85 Am. Dec. 553.

We think there is sufficient ambiguity in the condition under consideration to invoke the application of the rule that courts do not favor forfeitures under such provisions: *Chandler v. St. Paul etc. Ins. Co.*, 21 Minn. 85, 18 Am. Rep. 385; *Symonds v. Northwestern Mut. Life Ins. Co.*, 23 Minn. 491; *Hoffman v. Aetna Fire Ins. Co.*, 32 N. Y. 405, 414, 88 Am. Dec. 337; *Catlin v. Springfield Fire Ins. Co.*, 1 Sum. 434-440; *McAllister v. New England Mut. Life Ins. Co.*, 101 Mass. 558, 3 Am. Rep. 404; *Kentucky Mut. Ins. Co. v. Jenks*, 5 Ind. 103.

It is a matter of nice discrimination to determine whether the word "interest," as used in the condition, is synonymous with the word "title," or whether it means that and something besides. The authorities generally establish the rule that where the condition is against any change in the legal title, an executory contract of sale is not a violation of the condition, so that if the word "interest," as used in this proviso, meant "title," there would be no difficulty in reaching the conclusion that the policy was not forfeited: *Smith v. Phoenix Ins. Co.*, 91 Cal. 323, 25 Am. St. Rep. 191; *Kempton v. State Ins. Co.*, 62 Iowa, 83; *Grable v. German Ins. Co.*, 32 Neb. 645; *Washington Ins. Co. v. Kelly*, 32 Md. 421, 3 Am. Rep. 149; *Home Ins. Co. v. Bethel*, 142 Ill. 537; *Masters v. Madison Co. Mut. Ins. Co.*, 11 Barb. 624; *Hill v. Cumberland Valley etc. Co.*, 59 Pa. St. 474; *Browning v. Home Ins. Co.*, 71 N. Y. 508, 27 Am. Rep. 86.

What, then, does the word "interest" in the provision, "if the interest of the assured be or become other than the entire, unconditional, unencumbered, and sole ownership of the property," etc., mean? Is it synonymous with "title"? In *Gibb v. Philadelphia Fire Ins. Co.*, 59 Minn. 267, 50 Am. St. Rep. 504,

the provision was: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void . . . if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance," etc. The facts, as they pertained to this provision, were that the assured had made a contract in writing whereby he sold and agreed to convey to the grantee the insured premises, by deed of warranty, on prompt and full performance by her of the agreement, which was that she (grantee) was to pay therefor the sum of two thousand five hundred dollars, three hundred dollars cash, and one thousand dollars in installments of fifty dollars every sixty days thereafter until paid, the balance to be paid in assuming a certain mortgage. The grantee was to have possession of the premises until default in payment, ⁵⁰⁰ and in case of default she agreed to surrender possession on demand, and that the agreement should be void at the option of the vendor. She (the grantee) entered into possession of the buildings and premises, and occupied the same until the time of the fire, and made all her payments during that time, and was not in default in any manner upon said contract. Upon these facts, the court ruled that there was a forfeiture of the policy. In *Germond v. Home Ins. Co.*, 2 Hun, 540, a policy of insurance provided that if the property should be sold or conveyed, or the interest of the parties therein changed, it should be null and void. After the issuing of the policy, the owner contracted, under seal, to sell the property conveyed thereby to one S., who paid part of the purchase price. In an action upon the policy, it was held that such contract of sale and payment constituted a change of interest in the property insured, and rendered the policy void. These cases are relied upon by the learned counsel for appellant to support his contention for a forfeiture of the policy, and, indeed, they are more nearly in point than any others we have been able to find. In the Minnesota case, there is a very marked difference in the language of the provision from that in the case at bar. That provision is, "if any change, etc., take place in the interest, title, or possession." Here the grammatical arrangement and punctuation (a comma being used between the words "interest" and "title") would indicate clearly that "interest" and "title" were intended to represent different ideas—were not used synonymously—while in the provision of the policy under consideration "if the interest of the assured be or becomes other than the," etc., "sole ownership," there is nothing to indicate

that the word "interest" was used in any other sense than as synonymous with ownership or title. The New York case, however, on this point is perfectly analogous, and directly decides, under the facts of that case, that the policy was forfeited. But, if we concede, upon the authority of these cases, that the word "interest" is not used synonymously with "title," the question still remains, Was there such a change of interest under the facts of this case as, in the contemplation of the parties, worked a forfeiture? In the Minnesota case, above, there ~~was~~^{was} could be no question about that, for the reason that the grantee had gone into and was in possession at the time the loss occurred, and had fully complied with the terms of the contract, which was definite as to the manner and time of performance. Likewise, in the New York case, the contract was under seal, and, we may therefore assume, was definite and certain in its terms. A part of the purchase price had been paid—how much is not stated. In both cases, the courts might very well have concluded that the contracts to convey conferred rights on the grantee therein, capable of enforcement according to their terms, which materially changed the status of the insurer and the insured toward each other, as to the risks to the premises, which said condition is intended to protect against. Not so under the facts here. Dunaway had made a proposition by letter to buy the premises, which is definite in nothing, except the amount he was to pay. Wilson accepted the proposition. There was no proof as to when the contract was to become executed. Dunaway says he paid two dollars and fifty cents on the purchase price just two days before the fire occurred, and that the money was paid when the trade was made. Wilson denies that the two dollars and fifty cents was paid as purchase money. But it is evident that, under the indefinite executory contract (if we may so call it) for the sale of the property, same was not to be performed until after the loss occurred, because a part of that performance on the part of Dunaway involved, in addition to the payment of one hundred dollars, the assumption of a mortgage; and, of course, the deed was not to be executed and delivered, and possession taken by Dunaway, until the purchase money was paid. At least, such would be the presumption, in the absence of proof to the contrary. Under such circumstances, the loss by fire would necessarily fall on Wilson. He still had the insurable interest in the property. He could not, after the fire, have compelled

Dunaway to take the place: *Wells v. Calnan*, 107 Mass. 514, 9 Am. Rep. 65, and authorities cited.

Both parties seem to have recognized the fact that the letters were simply an offer by the one to buy, and an agreement by the other to sell, at some time in the future, when the ⁶⁰³ purchase money should be paid, and the deed made and delivered. Before that time came, both recognized that the consideration had failed, and the contract was not enforceable. We are of the opinion that the alleged contract for the sale of the premises did not in any manner affect the risk which the parties to the contract of insurance contemplated and provided against in the condition named. Hence the court did not err in refusing to grant appellant's request for instruction numbered 6.

The other grounds urged for reversal are not well taken. The judgment of the Faulkner circuit court is, therefore, in all things affirmed.

CONTRACTS IN WRITING ARE TO BE CONSTRUED by the court and not by the jury: *Leaphart v. Commercial Bank*, 45 S. C. 563, 55 Am. St. Rep. 800.

INSURANCE, FIRE.—FORFEITURES ARE CONSTRUED most strongly against the insurer, and are never extended beyond the strict words of the policy: *Snyder v. Dwelling-House Ins. Co.*, 59 N. J. L. 544, 59 Am. St. Rep. 625; *Dover Glass Works Co. v. American etc. Ins. Co.*, 1 Marv. (Del.) 32, 65 Am. St. Rep. 264.

INSURANCE, FIRE.—AN EXECUTORY CONTRACT OF SALE does not constitute a change of interest within the meaning of a policy of insurance conditioned to be void if there is any change in the title of the insured property: *Washington etc. Ins. Co. v. Kelly*, 32 Md. 421, 3 Am. Rep. 149; *Smith v. Phoenix Ins. Co.*, 91 Cal. 323, 25 Am. St. Rep. 191.

PLANTERS' MUTUAL INSURANCE COMPANY v. LOYD.

[67 Arkansas, 584.]

INSURANCE—FORFEITURE—WAIVER.—When an insurer, with knowledge of any act on the part of the insured which works a forfeiture, enters into negotiations with him which recognize the continued validity of the policy, and thus induces him to incur expense or trouble under the belief that his loss will be paid, the forfeiture is waived.

INSURANCE — FORFEITURE ON ONE GROUND — WAIVER.—An act by an insurer which waives one ground of forfeiture will not affect another ground of forfeiture of which the insurer was ignorant.

INSURANCE—WAIVER OF FORFEITURE.—THE BURDEN of showing the waiver of a forfeiture by an insurer is on the insured.

INSURANCE—FORFEITURE OF POLICY—STATEMENT OF OWNERSHIP.—Where an insured states in his application that he is the sole owner of property, when in fact it is owned by his wife, the policy is forfeited, under a stipulation that if this answer was untrue, or his interest any other than a perfect legal and equitable ownership, the policy should be void.

INSURANCE—STATEMENT OF OWNERSHIP—NOTICE TO INSURER.—A statement by an insured in an application for insurance that he was the sole owner of the property, though the property was not in his name, when in fact he was neither the legal nor equitable owner of the property, is not sufficient notice to put the insurance company on inquiry by which it could have learned the facts, and does not prevent it from claiming a forfeiture of the policy because such answer is untrue.

J. W. House, for the appellant.

L. A. Byrne, for the appellee.

587 RIDDICK, J. This is an action 588 on a fire insurance policy. The plaintiff, Loyd, in the written application upon which the policy was issued, stated that there were no unsatisfied judgments against him, and that he was the sole owner of the property to be insured. It was conclusively shown at the trial that these statements were not true. There were unsatisfied judgments against him, and he was not the owner of the property. It belonged to his wife. But it is said that if any forfeiture existed by reason of these statements in the application, it was waived. The facts relied upon as a waiver are that, shortly after the loss occurred, the adjuster of the association met Loyd and his attorney at the office of the latter. The adjuster had heard of the judgments against Loyd, and on that ground denied that the company was liable, and refused to pay the face of the policy, but offered to compromise. Loyd declined to accept the compromise, and thereupon the adjuster left, saying: "You can make your proofs. I have ninety days in which to settle." He afterward furnished blanks for plaintiff to make out his proof of loss. As the adjuster had notice that there were judgments against Loyd, and that the statements in his application with reference to such judgments and liens upon his property were not true, there is ground for the contention that any forfeiture arising from such misstatements was waived by the act of the adjuster in requesting plaintiff to make out proof of loss; and by leading plaintiff to incur expense of making such proof; for when the insurer, with knowledge of any act on the part of the assured which works a for-

feiture, enters into negotiations with him which recognize the continued validity of the policy, and thus induces him to incur expense or trouble under the belief that his loss will be paid, the forfeiture is waived: *German Ins. Co. v. Gibson*, 53 Ark. 494; *Phoenix Ins. Co. v. Flemming*, 65 Ark. 54, 67 Am. St. Rep. 900; 1 Wood on Insurance, sec. 89.

But, if at the time of such negotiations, the insurer is ignorant of the forfeiture and of the misstatement which causes it, no waiver can be implied. Nor will an act which impliedly waives one ground of forfeiture affect another forfeiture of which the company and its agent were ignorant: *Trott v. Woolwich Mut. Fire Ins. Co.*, 83 Me. 362. Now, if we concede that ⁵⁹⁰ any forfeiture caused by the statements in the application as to judgments and liens was waived, there is still the forfeiture caused by the fact that Loyd was not the owner of the property insured. He stated in his application that he was the sole owner thereof, but at the time he made this statement the property had been sold under a decree against him foreclosing a mortgage on the property, and had been purchased by another. It makes no difference that the purchaser was his wife, and that the purchase was made by Loyd in her name, as he stated, to avoid other claims against him. The material fact is that by the sale and purchase all interest in the property owned by him passed to his wife. The sale took place in 1896, and he had no right to redeem: *Martin v. Ward*, 60 Ark. 510. He stated in his application that he was the sole owner of the property, and the policy stipulated that if this answer was untrue, or his interest any other or less than a perfect legal and equitable ownership, except as stated thereon in writing, the policy should be absolutely null and void. It follows that the policy is void, unless this forfeiture was waived; and the burden of showing such a waiver was on plaintiff. We have stated the only act relied on as a waiver, and there is nothing to show that at the time of its occurrence the adjuster had notice that Loyd was not the owner of the property, or that his statement in the application that he was the owner was untrue. The adjuster testified that he had no notice of these facts until after this action commenced, and his testimony on this point is uncontradicted.

It is said that Loyd, in his application for insurance, stated that the title to the property was not in his name, and that this statement was sufficient to put the company on inquiry by which they could have learned the facts. But all the statements

on this point must be taken together, and they are in effect that he was the sole owner of the property, though the title was not in his name, and that there was an encumbrance on the property to the extent of one hundred and fifty dollars. These statements would naturally lead the company to conclude that Loyd owned the equitable or beneficial title, though the legal title was in another.

see Loyd must have known that his statements would leave this impression, for in his application to the Teutonia Company he had stated that the nature of his title was a "title bond in fee simple," and he had been informed by the Teutonia Company that this application had been delivered to the appellant association. He no doubt intended to make this impression, not necessarily to mislead the association, but probably because he himself regarded the purchase of the property in his wife's name, and the execution of notes by her for the purchase money, as a matter of no importance. This had been done, as he said, to avoid claims against himself, and he still intended to remain the beneficial owner. But the law regards such a transaction in a different light, and the insurance association cannot be bound by Loyd's opinion of the matter. He should have stated the facts, and allowed the association to put its own construction upon them. It is a matter of no moment that the legal title did not pass to Loyd's wife, for the equitable title did pass. The association had been told that the legal title was not in Loyd, but in another. It could not complain of that; but, as before stated, their defense is that, after such sale and purchase by his wife, he was neither the legal nor equitable owner of the property, and that his statement on that point was untrue. Our conclusion is that, under the facts as they appear in the record before us, this contention must be sustained, and the policy held to be void: *Rohrbach v. Germania Fire Ins. Co.*, 62 N. Y. 47, 20 Am. Rep. 451; *Columbian Ins. Co. v. Lawrence*, 2 Pet. 48; 1 Wood on Fire Insurance, sec. 194.

Counsel for appellant also contends that, as the association, by the terms of its policy, only agreed to pay Loyd a sum not exceeding the value of his interest in the property insured, he could not recover, even if there were no forfeiture, for his wife owned the property. There are cases which hold that, under statutes depriving the husband of the control of the wife's property, he has no insurable interest therein: *Trott v. Woolwich Mut. Fire Ins. Co.*, 83 Me. 362; *Traders' Ins. Co. v. Newman*, 120 Ind. 554.

⁵⁰¹ But we need not discuss that question, for, as the facts appear here, no recovery can be had under any view of the law on that point.

Judgment reversed and cause remanded for a new trial.

INSURANCE, FIRE—WAIVER OF FORFEITURE.—If an insurance company, after knowledge of the breach of a condition in the policy, enters into negotiations or transactions with the assured which recognize and treat the policy as still in force, and induce the assured to incur expense or trouble, it waives the right to insist upon a forfeiture: *Queen Ins. Co. v. Young*, 88 Ala. 424, 11 Am. St. Rep. 51; *Home Fire Ins. Co. v. Kennedy*, 47 Neb. 138, 53 Am. St. Rep. 521; *Hanover Fire Ins. Co. v. Bohn*, 48 Neb. 743, 58 Am. St. Rep. 719.

INSURANCE, FIRE—WAIVER OF DEFENSES.—By requiring proofs of loss stipulated for in a policy of insurance, the insurer does not waive his right to set up other defenses: *Boyd v. Insurance Co.*, 90 Tenn. 212, 25 Am. St. Rep. 676.

INSURANCE—WAIVER OF CONDITION.—THE BURDEN OF PROVING a waiver of a condition in a policy of fire insurance is upon the insured: *Phoenix Ins. Co. v. Flemming*, 65 Ark. 54, 67 Am. St. Rep. 900.

INSURANCE OF WIFE'S PROPERTY IN HUSBAND'S NAME. When a policy of fire insurance provides that it shall be void if the interest of the insured is not truly stated therein, and it is taken out on property of a wife in the name of her husband, without notice to the insurer of her ownership, she cannot recover for the loss in her own name: *Diffenbaugh v. Union Fire Ins. Co.*, 150 Pa. St. 270, 30 Am. St. Rep. 805. See, too, *Webster v. Dwelling-House Ins. Co.*, 58 Ohio St. 558, 58 Am. St. Rep. 658.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

FENTON v. EDWARDS.

[126 California, 48.]

A CHOSE IN ACTION HAS NO DEFINITE SITUS, but follows the person of its owner.

ASSIGNMENT FOR BENEFIT OF CREDITORS—CONFLICT OF LAWS.—A voluntary assignment, in one state, for the benefit of creditors, valid by the laws of that state, operates to convey personal property, not already subject to liens, in every state where it may be found.

ASSIGNMENT FOR BENEFIT OF CREDITORS, BY FOREIGN CORPORATION.—An assignment, by a foreign corporation, for the benefit of its creditors, conveys all its property to the assignee, including a debt to it due from residents of this state.

ATTACHMENT—GARNISHMENT OF DEBT DUE TO FOREIGN CORPORATION AFTER ASSIGNMENT FOR BENEFIT OF CREDITORS.—A debt due to a foreign corporation from residents of this state is not subject to garnishment here, after such corporation has made an assignment in another state for the benefit of creditors.

ASSIGNMENT FOR BENEFIT OF CREDITORS, BY FOREIGN CORPORATION—NOTICE OF, TO DEBTOR—ATTACHMENT.—An assignment made by a foreign corporation for the benefit of its creditors is binding upon its debtor here in attachment proceedings, though he did not receive notice of the assignment before the attachment was served, if he does receive such notice pendente lite in time to avail himself of it in discharge of the suit against him.

ASSIGNMENT FOR BENEFIT OF CREDITORS, BY FOREIGN CORPORATION—WHERE MADE—PRESUMPTION.—If an assignment by a foreign corporation for the benefit of creditors, made to an assignee residing in a state where the corporation was doing business, and in conformity with its laws, contains no statement showing where it was made, and this is not otherwise shown, the presumption is that it is valid, and was made in such state, although the home of the corporation was in another state.

ASSIGNMENT FOR BENEFIT OF CREDITORS—CONFLICT OF LAWS.—The laws of California concerning assignments for the benefit of creditors refer to all persons and property within its jurisdiction, but not to persons and property in a foreign jurisdiction. Hence, an assignment by a foreign corporation of all its property, including a debt due to it from a resident of California, is not void because it fails to conform to the assignment laws of such state, where no rights of any citizen of that state, or of property situate therein, are involved.

M. W. Conkling and Julian P. Jones, for the intervenor, appellant.

Anderson & Anderson, for Fenton, the assignee, respondent.

O. P. Widaman, for Edwards & Johnson, respondents.

⁴⁵ COOPER, C. This case was submitted in the court below upon an agreed statement of facts. Judgment was thereupon entered in favor of plaintiff, and this appeal is by the intervenor from the judgment, and comes here upon the judgment-roll. The agreed statement of facts, which may here be treated as the findings, shows, in substance, as follows: At all times mentioned in the said stipulation the Northrup, Braslan, Goodwin Company was a corporation, organized under the laws of Minnesota, doing business in Minneapolis and in Chicago, Illinois. On May 28, 1896, the said corporation made a general assignment for the benefit of their creditors to plaintiff, who is a resident of the state of Illinois, which assignment purported to convey to the plaintiff, as assignee, all the property, both real and personal, of the said corporation wheresoever situate. The said assignment was made in conformity with the voluntary assignment laws of the state of Illinois. The plaintiff duly qualified as such assignee, filed the proper bond in the office of the clerk of the county court of Cook county, Illinois, and ever since has been the assignee of said corporation, acting under the direction of said county court. It does not appear from the stipulation whether the assignment was executed in the state of Minnesota or the state of Illinois.

On said last-named date the defendants were indebted to said corporation in the sum of three hundred and thirty dollars and sixty-two cents, which said sum is the subject of controversy in this action. At the time of making the said assignment, and prior thereto, the said corporation was, and still is, indebted to the intervenor, who was and is a citizen of the state of Nebraska, in the sum of one thousand dollars.

On the seventeenth day of July, 1896, after proceedings duly commenced by the intervenor in the superior court of Los Angeles county, state of California, against said corporation, a writ of attachment was duly issued and served upon the defendants, by which it was attempted to levy upon and garnishee the amount so due the corporation by the defendants. After the said writ was served upon defendants, the plaintiff made demand upon them for the payment to him as assignee of the amount owing by them to said corporation. Defendants admit the indebtedness, but desire the court to determine to whom it ^{as} shall be paid. The only issue to be determined here is, whether the indebtedness due by defendants to the corporation passed to plaintiff by said assignment. If it did so pass, then, at the time of the levy of the said writ, the defendants were not indebted to said corporation, but to plaintiff, as such assignee, for the benefit of creditors. There is no question here as to rights of any citizen of this state or of property situate within this state. The chose in action due from defendants to the corporation has no situs in the state of California, but must follow the person of the owner, and was, therefore, in contemplation of law, situate in the state of Minnesota at the time of the said assignment: *Guillander v. Howell*, 35 N. Y. 662; *Burrill on Assignments*, 6th ed., sec. 282.

The above proposition is conceded by appellant's counsel. The stipulation of facts shows that the assignment "was made in conformity with the voluntary assignment laws of the state of Illinois," and that the laws of Minnesota and Illinois shall be considered before the court in determining the question in controversy. The Revised Statutes of Illinois provide that any debtor may make a voluntary assignment of his property for the benefit of his creditors: Ill. Rev. Stats., c. 10a, sec. 1.

The assignment, therefore, having been made to a resident of Chicago, in which place the corporation was doing business, under the laws of Illinois, and the assignee having qualified and filed his bond with the county clerk of Cook county, where he is now acting under the direction of the county court of said county, and the voluntary assignment law of Illinois, by its terms, applying to assignments made in the state of Illinois, we think the assignment was valid, and conveyed all the property of the corporation to the plaintiff, including the chose in action due from defendants to the corporation.

It is the rule of all the states of the Union that a contract valid in the place where it is made is valid everywhere: 2 Par-

sons on Contracts, 570; Burrill on Assignments, sec. 275; Story on Conflict of Laws, secs. 376-383; Guillander v. Howell, 35 N. Y. 662.

Certain exceptions are stated in the books in cases where a contract or sale affects property situate in a different state from the one in which the sale is made, or the revenue laws of another ⁴⁷ state, or if it conflicts with the interests of another state or its citizens.

In Burrill on Assignments, section 275, the rule is thus stated: "With regard to all contracts of which the subject matter is personal property, it may be laid down as a broad general proposition, subject, however, to numerous qualifications, that their validity is to be tested by the law of the place where the contract is made. If valid there, they will be everywhere sustained, and foreign tribunals, on principles of international and interstate comity, will, in determining their force and sufficiency, regard them in the light of the law where they were made. On this principle a voluntary assignment in one state, valid by the laws of that state, would operate to convey personal property (not already subject to liens) in every state where it might be found."

In Story on Conflict of Laws, section 423a, the author, in discussing the rule that sales and contracts in relation to personal property are to be construed according to the law of the domicile of the owner or the place of the contract, says: "Similar rules will govern in cases of voluntary assignments by debtors, and of involuntary assignments under the bankrupt laws of a state. In each case the *lex loci* of the assignment or the bankruptcy will ordinarily form the basis of the priorities and privileges attaching to his movable property, and will regulate the distribution thereof among his creditors, at least, if that is the place of his domicile and of the *situs* of the property."

In the case of *Means v. Hapgood*, 19 Pick. 105, it was held that an assignment made in the state of Maine by a citizen thereof to certain of his creditors, was valid against a subsequent attachment of the debt in the commonwealth of Massachusetts by a citizen thereof. The learned Chief Justice Shaw, in the opinion, said: "This is founded upon the general principle that an owner has the disposing power over property which is recognized by all civilized, and especially by all commercial, nations, to transfer his property for a good and valuable consideration, and the general disposition of all friendly governments to give effect to such contracts when not opposed by some great

consideration of public policy, or manifestly injurious to their own citizens. A fortiori is this true of the several states of the American ⁴⁸ Union, who, though foreign for some purposes, are united for many others."

In *Campbell v. Colorado Coal etc. Co.*, 9 Colo. 60, filed June 17, 1885, 7 West Coast Rep. 32, it is said: "It may be considered a settled doctrine that a voluntary assignment which is valid in the state where the owner resides will be held to pass personal property included, the situs of which is in another state. It is said that while 'an involuntary transfer of movable property abroad, by process at home, does not divest the title in prejudice of creditors domiciled at the place of the actual situs, a voluntary transfer by the act of the owner divests it everywhere.' This is in perfect harmony with the principle that while the *lex loci contractus* determines the validity of the contract, the *lex fori* controls the remedy': *Speed v. May*, 17 Pa. St. 91, 55 Am. Dec. 540; citing *Milne v. Moreton*, 6 Binn. 360, 6 Am. Dec. 466, and other cases. See, also, *Dehon v. Foster*, 4 Allen, 545, and cases cited."

In *Caskie v. Webster*, 2 Wall. Jr. 131, it was held that a general voluntary assignment, valid by the laws of one of the United States, though assumed to be void if it had been made in another state, will carry property in that other against a subsequent attaching creditor there. In the opinion it is said: "A debt is a mere incorporeal right. It has no situs, and follows the person of the creditor. A voluntary assignment of it by the creditor, which is valid by the laws of his domicile, whether such assignment be called legal or equitable, will operate as a transfer of the debt which should be regarded in all places."

In the case of *Law v. Mills*, 18 Pa. St. 185, Joy and Webster made a general assignment in the state of New York on November 17, 1849, for the benefit of their creditors. At the time of the assignment they had personal property in the state of Pennsylvania, which was, on November 20, 1849, levied upon by writ on a foreign judgment. It was held that the validity of the assignment was to be determined by the place of its execution, and being valid under the laws of New York, it conveyed personal property situate in Pennsylvania.

In *Schuler v. Israel*, 27 Fed. Rep. 851, it was held that a general assignment for the benefit of creditors valid in Texas, where it was executed, would be held valid in Missouri, unless ⁴⁹ it conflicted with the rights of resident creditors. In a note to the case last cited it is said: "A voluntary general assignment

for the benefit of creditors made in another state, and valid by its laws, will be recognized as valid, and as effectually transferring personal property wherever the same may be situated: *In re Paige etc. Lumber Co.*, 31 Minn. 136; *Butler v. Wendell*, 57 Mich. 62; 58 Am. Rep. 329." The general rule is, that a voluntary assignment of personal property, valid at the place where it is made, is valid everywhere and wherever the property may be situated, unless such transfer interferes with the domestic laws, policy, or rights of the citizens of the state in which the property is situate: *Burrill on Assignments*, 6th ed., 359, and cases cited in note 5.

It follows that the assignment conveyed the property to plaintiff, and that at the time the attachment was served the defendants were not indebted to the corporation, but to its assignee.

The fact that notice of the assignment was not given to defendants before the attachment was served upon them is immaterial. If the debtor receives notice of the assignment *pendente lite* in time to avail himself of it in discharge of the suit against him, this will be sufficient: *Story on Conflict of Laws*, sec. 396, and cases cited.

It is claimed that in the absence of any statement in the stipulation as to where the assignment was made, that we must presume that it was made in Minnesota. We think the presumption from the facts, as stated in the stipulation, is that it was made in Illinois. The laws of Illinois evidently apply to assignments made in the state, and the stipulation shows that the assignment was in conformity with the laws of the state. The assignee resided in Chicago, where the corporation was doing business, and is now acting under the directions of the county court of Cook county. The presumption is, that the assignment was valid, that the law has been obeyed and that the ordinary course of business has been pursued: *Code Civ. Proc.*, sec. 1963.

It is contended that the assignment is void because it does not comply with title 3, division 4, of the Civil Code of this state, providing for assignments for the benefit of creditors.⁵⁰ We think the provisions of the Civil Code referred to apply to assignments of property situate in the state of California. This is apparent by section 3451, which, among other things, provides: "The provisions of this title do not prevent a person residing in another state or country from making there, in good

faith, and without intent to evade the laws of this state, a transfer of property situated within it; but such person cannot make a general assignment of property situated in this state for the satisfaction of all his creditors, except as in this title provided."

The section *ex industria* provides that a transfer of property by a resident of another state, made in good faith, of property situate within this state will be treated here as valid, except that a general assignment for the benefit of creditors of property situate in this state cannot be made. As there was no attempted transfer of any property claimed to be in this state by the assignment, the rule of section 3451 cannot be applied. It is true that the section states that it is not intended to prevent a resident of another state from disposing of or transferring property situate within this state, except that a general assignment of such property cannot be made except as in the title provided, but this only strengthens the view we have already expressed, that it was not intended to interfere with any assignment made by a party residing in another state of property in such other state. It is claimed by counsel for intervenor that the first part of section 3451 refers to property situated in another state. If so the section should read: "The provisions of this title do not prevent a person residing in another state or country from making there, in good faith, and without intent to evade the laws of this state, a transfer of property situated within such other state or country."

We certainly cannot think the legislature believed that the provisions of said title without the portions quoted would have prevented a person in another state from making there a transfer of property situated within such other state. If so, every provision of each of our codes should contain such exception. The laws of this state, in relation to assignments for the benefit of creditors, refer to all persons and property within its jurisdiction, but not to persons and property in a foreign jurisdiction ⁵¹ and in relation to an assignment made in such jurisdiction in a case where no rights of any of its citizens are involved.

We advise that the judgment be affirmed.

Chipman, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed.

Temple, J., McFarland, J., Henshaw, J.

CONFLICT OF LAWS.—CHOSER IN ACTION HAVE NO SITUS, and follow the person of the creditor: Pullen v. Hillman, 84 Me. 129, 30 Am. St. Rep. 340; note to Missouri Pac. Ry. Co. v. Sharitt, 19 Am. St. Rep. 145; Consolidated Tank Line Co. v. Collier, 148 Ill. 259, 39 Am. St. Rep. 181.

ASSIGNMENT FOR BENEFIT OF CREDITORS—VALIDITY—CONFLICT OF LAWS.—A voluntary assignment, in insolvency, for the benefit of creditors, if valid where made, is valid everywhere, unless repugnant to the law of the place where property of the insolvent is situated, and detrimental to the rights of domestic creditors in the latter jurisdiction: Notes to Ward v. Connecticut etc. Mfg. Co., 71 Am. St. Rep. 213; Neufelder v. North British etc. Ins. Co., 45 Am. St. Rep. 799.

ASSIGNMENT FOR BENEFIT OF CREDITORS—EFFECT OF, ON PROPERTY—CONFLICT OF LAWS.—A voluntary conveyance of property for the benefit of creditors, valid where made, transfers the title, though the property is in another state, unless the statutes or local policy of that state forbid it: Ward v. Connecticut etc. Mfg. Co., 71 Conn. 345, 71 Am. St. Rep. 207; Hanford v. Paine, 32 Vt. 442, 78 Am. Dec. 586, and monographic note thereto on the extraterritorial effect of assignments for the benefit of creditors.

ASSIGNMENT FOR BENEFIT OF CREDITORS—ATTACHMENT—CONFLICT OF LAWS.—No creditor can, by attachment or garnishment, take any part of an estate held by an assignee for the benefit of creditors under a valid assignment out of his hands, and apply it to the payment of his debt: Moody v. Carroll, 71 Tex. 143, 10 Am. St. Rep. 734. And a debtor, having notice of the assignment of a debt made by his creditor, cannot, by paying moneys to an officer subsequently garnishing the debt, under a writ against the creditor, relieve himself from liability to such assignee: Merchants' etc. Nat. Bank v. Barnes, 18 Mont. 335, 56 Am. St. Rep. 586. A voluntary assignment by a debtor of all of his property for the benefit of his creditors, valid by the law of his domicile, will prevail against the lien of an attachment subsequently issued in another state in favor of a creditor there, whether citizen or nonresident, upon a debt of the original assignor embraced in the assignment, provided the recognition of the title under the assignment does not contravene the statutory law of the state, or is not repugnant to its public policy: Barth v. Backus, 140 N. Y. 230, 37 Am. St. Rep. 545. An assignment for the benefit of creditors, executed in Iowa, takes precedence over a garnishment subsequently levied in Illinois, at the instance of a resident of Ohio, to attach indebtedness due from a resident in Illinois to the assignor in Iowa: Consolidated Tank Line Co. v. Collier, 148 Ill. 259, 39 Am. St. Rep. 181.

ASSIGNMENT FOR BENEFIT OF CREDITORS.—THE SOUTH CAROLINA ACT relating to assignments for the benefit of creditors applies as well to assignments made outside the state as to those made within it: *Ex parte Dickinson*, 29 S. C. 453, 18 Am. St. Rep. 749.

MANN v. O'SULLIVAN.

[128 California, 61.]

MASTER AND SERVANT.—FELLOW-SERVANTS ARE ENGAGED IN A COMMON EMPLOYMENT when each of them is occupied in service of such a kind that all the others, in the exercise of ordinary sagacity, ought to be able to foresee, when accepting their employment, that his negligence would probably expose them to injury.

MASTER AND SERVANT — FELLOW-SERVANTS — ASSUMPTION OF RISKS.—Employés assume the risk incident to danger from the negligence of a coemployé, where such danger is fairly apparent.

MASTER AND SERVANT—FELLOW-SERVANTS—ELEVATOR OPERATOR.—A CARPENTER engaged in inclosing an elevator shaft within a glass frame for the owner of a building is a fellow-servant with one who is operating the elevator at the time for such owner, as they are employed "in the same general business." Hence, the owner is not answerable for an injury to the carpenter which results from the operator's negligence.

MASTER AND SERVANT—FELLOW-SERVANT—INJURY BY—PLEADING.—If a complaint for personal injury shows that the injury was caused by the negligence of the plaintiff's fellow-servant, that fact need not be pleaded in the answer, but may be taken advantage of by demurrer.

MASTER AND SERVANT—DANGEROUS WORK—MASTER'S DUTY.—If a carpenter, engaged in repairing an elevator, relies alone upon his confidence that the operator of the elevator will not start it without giving him notice, in accordance with the contractor's request, the master is not bound to give such notice, and is not answerable for an injury caused by the failure of the operator to give it.

Gunnison, Booth & Bartnett, for the appellant.

Henry E. Monroe, Ira D. Orton, C. Porter Johnson, and Reddy, Campbell & Metson, for the respondent.

⁶³ **GAROUTTE, J.** This is an action to recover damages for personal injuries. The single question involved is, Does the complaint state a cause of action?

Defendant was the owner of a certain building in which she operated and maintained an elevator. As appears by the complaint "plaintiff was employed by said defendant to work for her in the capacity of a carpenter and to perform the work of inclosing the elevator shaft in said premises within a glass frame." While working at this employment "said defendant, through her servant, agent and employé, one Emmet Carney, carelessly and negligently, and without any warning or notice . . . to plaintiff, and against his positive instructions not to operate the elevator herein mentioned at any time with-

out notice to him, suddenly operated said elevator from the ground floor, where said elevator was standing, so that said elevator suddenly struck with great force the screening on which plaintiff was working as aforesaid;⁶⁴ and that, by reason of the gross negligence and carelessness of said defendant in operating said elevator as aforesaid, said plaintiff sustained the injuries above mentioned."

The important matter presented by this appeal arises upon the solution of the question as to whether or not the plaintiff and Carney, the man operating the elevator, were fellow-servants. In other words, these two men being employed by defendant, were they employed "in the same general business"? Civ. Code, sec. 1970. It is impossible to declare a rule of law by which all cases presenting this interesting question may be weighed and tested. In that excellent work, the American and English Encyclopedia of Law, volume 7, page 864, it is said: "In the note will be found every authority, it is believed, determining who are and who are not fellow-servants, alphabetically arranged according to the various occupations or employments." Yet, after a careful perusal of that note, we still find the same mist surrounding the question, and the legal atmosphere in no great degree clarified. The authorities are widely divergent, and the text-writers appear to be unable to agree upon a satisfactory rule by which it may be determined who are fellow-servants, or what servants are engaged in a common employment, or, as the statute of this state has it, what servants are employed "in the same general business." Shearman and Redfield, in their work upon Negligence, declare the rule as favorably to the servant as it can be found in any standard work, and that rule is declared in section 236: "Under the generally prevailing rule, fellow-servants are engaged in a common employment when each of them is occupied in service of such a kind that all the others in the exercise of ordinary sagacity ought to be able to foresee, when accepting their employment, that his negligence would probably expose them to injury." Testing this case by the foregoing rule, the conclusion is irresistible that plaintiff, who was employed to repair the elevator shaft, and Carney, the man who was employed to operate the elevator, were servants of defendant, engaged in a common employment, or, as our statute has it, engaged "in the same general business." It was plain to the plaintiff when he began work in repairing the elevator shaft that the negligence of Carney would expose him to great danger. ⁶⁵

He recognized the fact that danger was present with him, for he instructed Carney not to raise the elevator without a notification to him, in order that he might first remove to a place of safety. The conclusion arrived at in many cases rests upon the principle that the danger from the negligence of another employé being fairly apparent, it should be held that all other employés assume the risk incident to that danger; and this principle forms the foundation of the rule which we have quoted from Shearman and Redfield.

We will notice a few cases where the facts and principle invoked appear to be similar to those here presented. In *Besel v. New York Cent. R. R. Co.*, 70 N. Y. 171, it is held that a car repairer working upon a car was in common employment with the men in charge of a train not connected with the car upon which the repairer was doing the work. To the same effect is *Corcoran v. Delaware etc. R. R. Co.*, 126 N. Y. 673, and *Campbell v. Pennsylvania R. R. Co.* (Penn., Jan. 4, 1886), 24 Am. & Eng. R. R. Cas. 427. In *Hasty v. Sears*, 157 Mass. 123, 34 Am. St. Rep. 267, a case identical in its facts with the one before us, the court said: "The plaintiff and the elevator boy were both servants of the defendant at the time of the plaintiff's injury, and, as their employment was a common employment, the negligence of the boy in running the car down upon the plaintiff was an obvious risk which the plaintiff assumed, and for which the defendant is not answerable to him. The plaintiff and the boy were both working to secure the successful operation of the elevator, the plaintiff in repairing it and the boy in operating the car, and they were forwarding a common enterprise for the benefit of the defendant, and were in a common employment." In *Fagundes v. Central Pac. R. R. Co.*, 79 Cal. 97, it is held that a laborer working upon the railroad track is a fellow-servant with a conductor and a track-walker. In *Livingstone v. Kodiak Packing Co.*, 103 Cal. 263, it is held that the mate of a vessel and a waiter at the table are engaged "in the same general business," in the sense of those words as used in section 1970 of the Civil Code. The court declared that the general business of the defendant was the carrying of freight and passengers upon its steamer; that in the conduct of that business a waiter was as necessary an employé as a mate, and both were essentially ^{as} necessary for the proper conduct of the business. In the case at bar, it may be said that the business of defendant was operating and maintaining an elevator. A boy or man to manipulate it was a necessity, and likewise an

engineer to handle the engine and furnish the power, and likewise a man to repair the machine itself when out of order. These men in their respective lines of vocation were necessary to the operation of the machine, and were assisting in the same general business of operating and maintaining the machine. The man to repair the elevator when it was out of order was as necessary as the waiter to the ship, or the repairer to the car, or the laborer to the railroad track. The allegation of the plaintiff that he was employed by the defendant in the capacity of a carpenter to do certain work for her, and that at the time he received the injury complained of he was doing the work for which he was employed "under the direction of the defendant," shows that he was not an independent contractor, and precludes him from invoking the principles declared in *Bennett v. Truebody*, 66 Cal. 510, 56 Am. Rep. 117. The defendant would have been liable to a stranger for any injury sustained by reason of his negligence upon the ground that he was the servant of the defendant.

It is also claimed that from the face of the complaint it appears that the accident occurred from the negligence of the defendant herself. The pleading does not bear this construction. After stating that the accident occurred by reason of Carney operating the elevator, the pleading then declares that "defendant did thereby negligently and carelessly precipitate with great force," etc. The complaint further declares that "by reason of the gross negligence and carelessness of said defendant in operating said elevator as aforesaid said plaintiff sustained the injuries," etc. It is entirely plain from these allegations that the elevator was being operated by Carney, and that by reason of his negligence in so operating it the accident occurred. By any reasonable construction of the pleading it contains nothing indicating negligence upon the part of anyone except Carney.

It is next insisted that if plaintiff and Carney were fellow-servants and engaged in the same general business, then that fact should be pleaded in the answer. It is sufficient to say that ⁶⁷ if the facts alleged in the complaint show that the servants are fellow-servants and engaged in the same general business, then that fact may be taken advantage of by demurrer.

It is also declared that it was the duty of the master to warn plaintiff when the elevator was about to start. If there had been an express agreement to that effect made by the master and the servant, the plaintiff, when he was hired to do the work,

there might be some force in this contention: *Bradley v. New York Cent. R. R. Co.*, 62 N. Y. 99. But plaintiff went to work without any such agreement, and acted alone upon the confidence he had in a compliance with the request he made to the elevator man, Carney, to give him notice of the starting of the cage.

For the foregoing reasons the judgment is affirmed.

Van Dyke, J., Harrison, J., McFarland, J., and Henshaw, J., concurred.

MASTER AND SERVANT—FELLOW-SERVANTS, WHO ARE Employés serving a common master, engaged in the same common pursuit, and in accomplishing the same common object, are fellow-servants: *Note to Norfolk etc. R. R. Co. v. Hoover*, 47 Am. St. Rep. 402.

MASTER AND SERVANT—FELLOW-SERVANTS—ASSUMPTION OF RISKS.—A servant assumes all open and palpable risk of accident in the common course of the business, including the negligence of fellow-servants: *Note to Mielke v. Chicago etc. Ry. Co.*, 74 Am. St. Rep. 837; and monographic note to *Mast v. Kern*, 75 Am. St. Rep. 606, on who is a vice-principal.

MASTER AND SERVANT—INJURY TO FELLOW-SERVANT. A MASTER IS NOT ANSWERABLE to a servant for injuries inflicted on him by the negligence of another servant in the same common employment, and not traceable to the personal negligence of the master: *Fiak v. Central Pac. R. R. Co.*, 72 Cal. 88, 1 Am. St. Rep. 22.

HAYS v. PLUMMER.

[126 California, 107.]

NEGOTIABLE INSTRUMENTS—INDORSEMENT—NECESSITY OF.—A note payable to a certain person or order can take its place in the hands of a subsequent holder with the peculiar qualities and incidents of negotiable paper only where it has been regularly indorsed in such a way that the indorsement becomes a part of the paper.

NEGOTIABLE INSTRUMENTS—TRANSFER OF, WITHOUT INDORSEMENT—DEFENSE—GENERAL RULE.—If negotiable paper, payable to order, is delivered to a purchaser without indorsement, he takes only the rights which the payee has, and the paper is subject to any defense which the payor may rightfully assert as against the payee.

NEGOTIABLE INSTRUMENTS—TRANSFER OF, BY SEPARATE WRITING—FAILURE OF CONSIDERATION AS A DEFENSE.—An assignment of a mortgage and note, made on a separate writing, without indorsement on the note, does not confer upon the assignee the rights of an indorser in due course, and the maker, in an action upon the note and mortgage, may, therefore, plead failure of consideration as a defense.

NEGOTIABLE INSTRUMENTS—TRANSFER OF, WITHOUT INDORSEMENT—FAILURE OF CONSIDERATION AS A DEFENSE—ESTOPPEL.—If a note and mortgage, given to a contractor, as the consideration for constructing certain buildings, are transferred without indorsement on the note, and suit is brought thereon, the maker may plead failure of consideration as a defense, where the payee failed to do the work, although the plaintiff, having knowledge of the consideration for the note, took it before any actual breach of the contract, and notwithstanding an agreement between the maker and the payee that the latter might use the note and mortgage as security for borrowed money.

NEGOTIABLE INSTRUMENTS—DEFENSE OF FAILURE OF CONSIDERATION—EVIDENCE INADMISSIBLE.—If a note and mortgage, given by an owner to a contractor as the consideration for constructing certain buildings, are transferred without indorsement on the note, and the assignee sues thereon, in which suit a failure of consideration is pleaded as a defense by the maker, evidence that the contractor gave a bond to the owner for the faithful performance of his contract is not admissible in evidence, for it is not connected with the other instruments, or the defense thereto, but is separate and distinct from them.

Murphy & Gottschalk, for the appellant.

R. Dunnigan, H. L. Dunnigan, and Dunnigan & Dunnigan, for the respondents.

¹⁰⁸ **McFARLAND, J.** Action upon a note and mortgage made and executed August 5, 1896, by the defendants Eugene R. Plummer and his wife, Maria A. Plummer, to the defendant John P. McCormick, and assigned by him August 14, 1896, to plaintiff. Judgment was rendered in favor of the Plummers, and from this judgment and from an order denying a new trial, and also from an order denying plaintiff's motion to vacate the judgment and to enter a judgment for plaintiff under section 663 of the Code of Civil Procedure, plaintiff appeals.

On the said fifth day of August, 1896, the defendant Eugene R. Plummer entered into a written contract with the defendant McCormick, by which the latter agreed to construct and complete certain buildings on a lot owned by the former for a ¹⁰⁹ certain sum of money—the buildings to be commenced within ten days and finished within fifty days. It was recited in the contract that Plummer had given a note secured by a mortgage on the lot for the amount to be paid for the buildings, and he did give such note and mortgage on said day in consideration of McCormick's promise to construct the buildings. McCormick agreed to give a bond for his performance of the contract. The note was on its face negotiable in form—being payable to McCormick or order; but the mortgage referred to the note and contained some stipulations which, if expressed

on the face of the note, would, perhaps, have made the latter non-negotiable. On the 14th of the month, plaintiff loaned McCormick five hundred dollars, for which he took the latter's note, and to secure the loan McCormick assigned to plaintiff the note and mortgage above mentioned, and upon which this suit is brought. At the time of the assignment plaintiff knew all the facts as above stated, and knew that the consideration for the note and mortgage was the promise of McCormick to construct the buildings. McCormick did not construct the buildings within the time mentioned, or at any time. There was no indorsement of the note by McCormick; but the assignment of the note and mortgage was made by means of a separate written instrument. The Plummers set up a failure of consideration as a defense to the action.

The first question is, whether plaintiff is in the position of one who has taken in due course a negotiable instrument before maturity freed from any equities between the original parties, or whether he merely stands in the shoes of McCormick. Counsel for respondent contends that, even if the note be considered negotiable, as plaintiff knew its consideration when he took it, he is liable to defendants' claim of want of consideration, and, moreover, that under our peculiar statutory provision (Code Civ. Proc., sec. 726) that there shall be only one action for the recovery of a debt secured by mortgage in which the mortgage must be foreclosed before there can be a personal judgment, a note, though in form negotiable, is in law not negotiable if secured by a mortgage of even date, which makes it payable primarily out of a peculiar fund—at least as against one having knowledge of the mortgage; but we need not examine ¹¹⁰ these contentions because, for another reason, plaintiff is not in the position of a holder in due course of negotiable paper. An instrument payable to a certain person or order can take its place in the hands of a subsequent holder with the peculiar qualities and incidents of negotiable paper only where it has been regularly indorsed; and such indorsement can be made only by the writing of the indorser's name on the back of the instrument, if there be room to do so, and, if not, then on a paper so attached to it as in effect to become part of it—called sometimes an allonge. Whether or not a name written on the face of the note might not in some instances be an indorsement need not be discussed; at all events, the name must be so written as to become, in effect, a part of the instrument. This is not only the rule under the general authorities, but it

is so declared by our code: Civ. Code, sec. 3110. In the case at bar, there was merely an assignment of the mortgage and note made on a separate writing, without indorsement on the note. The general rule that such assignment without indorsement did not give plaintiff the rights of an indorser in due course is elementary. In Story on Promissory Notes, seventh edition, section 120, the author, speaking of a note payable to a person or his order, says: "If there be an assignment thereof without an indorsement, the holder will thereby acquire the same rights only as he would acquire upon an assignment of a note not negotiable." Many of the authorities on the point are collated in notes to Randolph on Commercial Paper, sections 788 and 789, second edition, and the rule is stated in the text as follows: "If a bill is payable to order, and transferred without indorsement, its transfer will be subject to defenses existing against the transferrer. . . . An assignment in like manner, unaccompanied by indorsement, is subject to defense. This is true, for instance, where the assignment is contained in an assignment of the mortgage securing the note" (paragraph 788), and in paragraph 789 it is stated: "Unless a bill or note is payable to bearer, its indorsement is necessary to constitute the holder a bona fide holder in due course of business; and the absence of such indorsement amounts to a notice of equities, and leaves the paper subject to defense in the hands of such holder." Many of the authorities are also cited ¹¹¹ in Franklin v. Twogood, 18 Iowa, 515, where the rule as stated in the above quotation from Story is declared. Authorities to the point are also cited in Osgood v. Artt, 17 Fed. Rep. 575, where Mr. Justice Harlan says: "It is a settled doctrine of the law merchant that the bona fide purchaser for value of negotiable paper, payable to order, if it be indorsed by the payee, takes the legal title unaffected by any equities which the payor may have as against the payee. But it is equally well settled that the purchaser, if the paper be delivered to him without indorsement, takes by the law merchant only the rights which the payee has, and, therefore, it is subject to any defense the payor may rightfully assert as against the payee."

Plaintiff, therefore, stands in the shoes of McCormick, and the Plummers have all the defenses against the former that they would have in a suit brought by the latter; and the failure of the consideration for which the note was given is clearly a legal and just defense. The case cited by appellant, where it was held that an absolute and unconditional executed conveyance

in fee of land is not invalid because the grantee fails afterward to pay the purchase price, is not in point; here there was a mere executory promise to pay, with an incidental mortgage which is not a conveyance. Nor is there anything in the point that plaintiff took the note before any actual breach of the contract; in the first place, he took it with knowledge that a failure to construct the buildings would be a defense to a suit on the note, and, in the second place, there was no notice of the assignment given to Plummer until the first interest became due, which was long after the breach, and the defense therefore was one "existing . . . before notice of the assignment": Code Civ. Proc., sec. 368.

The court did not err in ruling out evidence that there was an understanding between Plummer and McCormick that the latter might use the note and mortgage as security for borrowed money; that did not change the fact that plaintiff took the note and mortgage simply for what it was worth as security, having knowledge of the consideration for the note as above stated.

Neither did the court err in sustaining an objection to plaintiff's offer to prove that McCormick had given a bond as provided ¹¹² by the contract, and that Plummer had commenced an action against McCormick and his surety on the bond, and had recovered judgment. The bond provided for in the contract was merely "for the faithful performance of this contract, and for the payment of all labor and material furnished him in the erection, construction, and completion of the buildings erected under this agreement." The bond was a distinct instrument from the note and mortgage, and merely provided for such damages as Plummer might suffer from a failure of McCormick to complete the work, or from his failure to pay for labor, materials, etc.; and a recovery upon such a bond would be for damages not connected with the note and mortgage, and having no relation to a defense of want of consideration in a suit brought upon the note.

The judgment and orders appealed from are affirmed.

Temple, J., and Henshaw, J., concurred.

NEGOTIABLE INSTRUMENTS—TRANSFER OF, WITHOUT INDORSEMENT—ASSIGNMENT.—A note payable to a person or order may be transferred by the payee, without a commercial indorsement, by either an oral or a separate, distinct, written assignment thereof, followed by delivery. But the transferee of a note,

without indorsement, acquires no better title than had the payee; he holds it subject to all equities existing between the original parties, though he has paid full consideration without notice thereof: *Sackett v. Montgomery*, 57 Neb. 424, 73 Am. St. Rep. 522, and note.

BATHGATE v. IRVINE.

[126 California, 185.]

WATERS—PRIOR APPROPRIATION.—LOWER RIPARIAN PROPRIETORS cannot acquire the right to all the water of a creek, by prior appropriation, as against an upper riparian owner whose rights attached long before they made their appropriation.

WATERS—PRESCRIPTION.—LOWER RIPARIAN PROPRIETORS cannot acquire the right to all the water of a creek by taking it out at a point on their own land and using it only as the upper riparian proprietor permits it to pass down through his land to the lower owners, for such use by the latter is not adverse in the sense required to give a right by prescription.

WATERS—NONUSER—STRENGTHENING TITLE BY.—The nonuser of water by an upper riparian owner of land cannot be invoked to strengthen the claim of appropriation or prescription by a lower riparian owner, where the rights of the former attached first, and where the latter has used the water only as the former permitted it to pass to the lower owner.

WATERS—RIGHT TO DIVERT BEYOND WATERSHED. Land situated beyond the natural watershed of a stream is not riparian, although it is part of a contiguous tract, some of which is riparian, and riparian rights cannot extend beyond the watershed of the stream. Hence, the owner of such land cannot, under the sole claim of riparian right, take the water beyond such watershed, for any purpose, to the injury of another riparian owner.

WATERS—DIVERSION—RETURN OF.—Water diverted from a stream by an upper riparian owner must be returned at the upper boundary line or above the land of a lower riparian owner.

WATERS—SUIT BETWEEN RIPARIAN OWNERS—APPORTIONMENT.—In an action between riparian owners, the court, where it is unable, under the evidence, to apportion the water, may render judgment upon the rights of the parties, as riparian owners, with leave therein to any party to the suit to bring another action at any time to determine each party's proportionate part.

WATERS—APPORTIONMENT—EXCLUSION OF EVIDENCE—WHEN NOT PREJUDICIAL.—In an action between riparian owners to quiet title, the exclusion of evidence that the plaintiffs, the lower owners, had acquired by prescription all the riparian rights of all the riparian owners below them is not prejudicial error, where these owners were not parties to the suit, and the evidence was insufficient, as a whole, to enable the court to apportion the water.

WATERS—RIPARIAN PROPRIETORS—ACTION BETWEEN—IMMATERIAL EVIDENCE.—In a contest between ripa-

riar proprietors over the water of a stream, evidence which can add nothing to the plaintiff's right, as against the defendant, to divert the water is properly excluded as immaterial.

WATERS—KNOWLEDGE OF DIVERSION—ACQUIESCENCE—ADVERSE USE—ESTOPPEL.—An upper riparian proprietor's knowledge that lower riparian proprietors are using water taken out of a stream below him, and claim the right to use it, is not evidence of acquiescence on the part of the upper owner; nor does it, as against him, establish adverse use, or constitute matter of estoppel.

EVIDENCE—PROOF OF DECLARATIONS—WHEN PROPERLY EXCLUDED.—An offer to prove declarations of a defendant is properly excluded where the court has not been informed of the state of facts that such declarations are intended to prove.

WATERS—WHEN FACTS ASSUMED MAY BE TREATED AS ISSUES.—If, in an action brought by lower riparian proprietors against an upper owner to determine water rights, there is some question as to whether or not the defendant had parted with his title, but it is assumed that he was owner of the land when the action was brought, and the plaintiffs and defendant submit evidence on that assumption, the trial court is justified in treating the ownership of the land and the water rights of the respective parties as issues in the case.

COSTS—EXPERT WITNESSES—FEES OF.—Witnesses called by a party as experts are entitled to fees for daily attendance and for mileage as witnesses, but they are not entitled to fees as experts, or to be paid the expense of making surveys or preparing maps for such party, where they did not act under the direction of the court.

COSTS—RETAXATION OF—ERRONEOUS FINDING.—If two issues are presented, upon one of which there is a finding for the plaintiff, and upon the other an erroneous ruling for the defendant, and the court divides the costs, the cost of the trial of the latter issue should be retaxed in favor of the plaintiff.

Stephen M. White, White & Monroe, Victor Montgomery, and William T. Kendrick, for Bathgate and others.

Edwin H. Lamme, James G. Scarborough, Garber, Boalt & Bishop, and Guy C. Earl, for Irvine.

¹²⁷ **CHIPMAN, C.** Action to quiet the title of plaintiffs, two hundred and seventy-five in number, to the waters of Santiago creek in Orange county, and for an injunction.

Plaintiffs appeal from the judgment, from the order denying motion for new trial, and from certain parts of the order disallowing ¹²⁸ plaintiff's cost. Defendant appeals from certain parts of this latter order.

Santiago creek takes its rise in high mountain elevations on government land; it flows by a natural, well-defined channel through and over defendant's land, comprising about forty-eight thousand acres; thence over and through a tract of land, about one mile in width, owned by persons not made parties to the suit; thence enters and flows over and through plain-

tiff's lands, comprising in all about two thousand acres. The court found that the predecessors in interest of plaintiffs, about the year 1872, diverted and appropriated all the waters of this creek, about one mile below defendant's land, and used the same upon their said lands for irrigation and domestic purposes, and that said waters have been so used on plaintiffs' lands continuously for the past twenty-one years; that plaintiffs have expended large sums of money in cementing ditches and laying pipe lines from said point of diversion; that all the waters of said creek have been used by plaintiffs during the period for purposes of irrigation, domestic uses, and watering stock, "under claim of right, open, notoriously and continuously, and uninterruptedly, . . . but said waters have not been used adversely to defendant James Irvine, or his predecessors in interest, . . . and it is not true that the said defendant and his predecessors . . . knew that the plaintiffs . . . used said waters . . . adversely to the said defendant or his predecessors, or that said defendant and his predecessors in interest, or either of them, . . . acquiesced in said diversion and use by said plaintiffs"; that the waters diverted by plaintiffs "continue to be absolutely essential for the proper irrigation and maintenance of plaintiffs' said crops . . . and the use . . . has been . . . reasonable, and no diversion above said plaintiffs' point of diversion has, during any of the said times, been made by the said Irvine or others except as set forth in plaintiffs' complaint, . . . but that said diversion and use by plaintiffs have not been exclusive or adverse to said Irvine or his predecessors in interest." The allegation of the complaint as to defendant's diversion of the water is that about June 24, 1893, defendant constructed a dam in said stream on his own land about three miles above plaintiffs' lands and by means of a ¹⁸⁹⁰ ditch and flumes wrongfully and without the consent of plaintiffs, and against their objections, diverted the entire surface stream and carried the water out of the watershed in which said stream is situated and to a point where the waters do not return to the ancient channel of said stream, and that defendant continues to so divert all of the surface flow of said water to plaintiffs' great injury. The court further found that plaintiffs are and have been, during all the times mentioned in the complaint, as riparian owners, entitled to a portion of the waters naturally flowing in said creek, but are not entitled to all the waters, and that defendant and his predecessors are and have been entitled as like riparian owners to a portion of said

waters, "but the court is unable to find from the evidence adduced herein what is the exact or approximate part or portion of said waters to which the parties herein are each entitled"; that about two thousand two hundred acres of defendant's lands through which said creek flows, and lying within the watershed of said creek, are irrigable, but none of said lands have been heretofore irrigated; that it is not true that defendant is estopped from asserting any right to any part of said waters, and it is not true that defendant and his predecessors in interest acquiesced in or encouraged plaintiffs to make the improvements alleged in the complaint, or were grossly careless or negligent in omitting to give notice to plaintiffs that they claimed any interest in said waters adverse to plaintiffs; that plaintiffs were not, by the acts of defendant and his predecessors, led to believe that defendant and his predecessors had no interest in the waters of said creek, and plaintiffs had no reason to so believe, but plaintiff's rights were exercised in the belief that they had the exclusive right to said waters, and that they had no notice of the claim of defendant and his predecessors "except such notice as knowledge of the ownership hereinbefore found of the lands of the said ranchos by defendant and by his predecessors in interest . . . imparts, and that plaintiffs and their predecessors in interest had such knowledge, but that said belief on their part was not reasonable; that defendant and his predecessors in interest used the water at any and all times whenever necessary for domestic and stock uses, and have claimed the right so to do, and have, during the 140 years 1879 to 1892, used the lands of defendant mainly for pasturing sheep, there being at times thirty thousand thereof, and used the said water as needed for them."

As conclusions of law the court found: 1. That plaintiffs and defendant are riparian owners of lands through which said creek flows, and each is entitled to divert, take, and use a portion of said waters for the purpose of irrigating their said lands and for domestic use and watering stock; 2. Plaintiffs are entitled to judgment that defendant is not entitled to divert or use the whole of said waters, except for domestic and stock uses, or to divert or conduct any portion of the waters of said creek outside the watershed of said creek, nor to use any portion of said waters upon any lands, except for domestic and stock uses and purposes, from which said waters will not or cannot return to the ancient channel of said creek at or above the lands of plaintiffs as set forth in plaintiffs' complaint, and

to an injunction restraining defendant therefrom. Judgment was ordered accordingly, "with leave to any party herein at any time to bring another action to determine the parts and proportions of said waters to which they are respectively so entitled"; it was further ordered that plaintiffs and defendant each pay one-half of the fees of the reporter, and that plaintiffs recover their costs incurred in maintaining the issues as to defendant's taking the whole of the water at his place of diversion, and his taking the water out of the watershed for irrigating, and none others.

1. Plaintiffs contend that as lower riparian proprietors they acquired the right to all the waters of the creek by prior appropriation, notwithstanding defendant and his predecessors in interest were upper riparian owners long before plaintiffs made their appropriation. We understand the rule to be settled, and is no longer open to discussion in this state, that such right cannot be thus acquired: *Hargrave v. Cook*, 108 Cal. 72.

And it is equally well settled that no right to the water can be acquired by prescription where the lower riparian proprietor has taken the water out of the stream at a point on his own land and has used such water only as the upper riparian proprietor permitted it to pass down through his land to the lower owner; such use by the latter is not adverse in the sense required ¹⁴¹ to give a right by prescription: *Hargrave v. Cook*, 108 Cal. 72. Nor can the nonuser of the water by the upper riparian owner of land be invoked to strengthen the claim of appropriation or prescription by the lower riparian owner under like circumstances: *Hargrave v. Cook*, 108 Cal. 72.

In appropriating the water which flows across his land, the lower appropriator invades no right of the upper riparian proprietor. The latter has no right of action to prevent such use, for he is in nowise injured, and the former should not be permitted to acquire a right in this manner which the latter is powerless to prevent. The case is quite different where the upper owner appropriates the water. The lower owner is injured at once and the law gives him a remedy, and, if he fails to avail himself of it, the appropriation may, by lapse of time, ripen into an absolute right.

The further claim of plaintiffs is in the nature of estoppel. It is alleged that the predecessors of defendant, with full knowledge that plaintiffs had diverted all the water of the creek and had appropriated it all for proper uses, and were expending large sums of money in constructing ditches and lines of pipe,

stood by, without protest or objection, and acquiesced in the use of the water by plaintiffs and abandoned their rights therein to plaintiffs; and that by their acts they are now estopped from asserting any claim to the water. The court found against plaintiffs upon this branch of the case, and these findings are supported by the evidence.

2. The court found as conclusion of law that defendant, as riparian owner, has the right to take water away from the watershed of the creek "for stock and domestic purposes" upon his lands which are riparian to the stream, to a point from which the water will not and cannot return to the ancient channel of the creek, but has no right to so take it for purposes of irrigation. It was said in *Chauvet v. Hill*, 93 Cal. 407, that "no one by virtue of riparian ownership can rightfully divert water beyond the watershed of the stream from which he takes it."

It is claimed by defendant that *Chauvet v. Hill*, 93 Cal. 407, is not in point, because in that case the water was taken beyond the watershed for manufacturing purposes, and there would be a ¹⁴² surplus which, of course, should be returned to the stream, whereas, when used for domestic and stock purposes, the reason of the rule would not apply, because there would be no surplus water to return to the stream—it would all be consumed; for like reason defendant claims that he may take the water beyond the watershed for irrigation, provided he consumes it all. On the other hand, it is contended that land situated beyond the watershed cannot be said to be riparian, although part of a contiguous tract some of which is riparian; that land which contributes nothing to the stream by drainage or seepage, but carries all its waters elsewhere to other streams, ought not to have the benefits attaching to lands which contribute by drainage and seepage to that stream; that if the riparian owner may take water for any one use because he is such owner, his right to so take water for any other use, no matter what, must be governed by the same rule; and, therefore, if he cannot take it beyond the watershed for manufacturing purposes, neither can he for domestic and stock purposes nor for irrigation. The rule of the common law as to riparian rights in its extreme rigor has not been found to be adapted to the conditions existing in this state. At common law, the riparian owner was limited in the use of the water of a stream to domestic purposes and watering stock and might utilize it for power. We have added to these purposes that of reasonable use for irrigation:

Gould v. Stafford, 77 Cal. 66, and other cases; but we are not aware that it has ever been held that water could be taken entirely away from the watershed for any of these purposes under the claim of riparian right.

It is in evidence here (and the same situation frequently occurs in this state) that there is irrigable land within defendant's tract to which water may be profitably taken from Santiago creek where there is no outlet whatever to any stream, and which is not within the watershed of this creek; water taken to this land, it is claimed, would be entirely consumed if used for irrigation or for domestic or stock purposes. If it be true, as defendant claims, that where the water is consumed it is immaterial whether it be within or without the watershed, the reason may be said to apply as well where the use is for irrigation as where it is for watering stock or domestic purposes. ¹⁴³ We think the rule should be that under the claim alone of riparian right the owner of the land cannot, to the injury of another riparian owner, take the water beyond the natural watershed of the stream for any purpose, and that riparian rights cannot extend beyond the watershed of the stream, and that lands so situated are not to be regarded as riparian. If it ever was a rule anywhere, which we doubt, that the riparian owner, under riparian right alone, could take the water of the riparian stream to any part of his land contiguous to his riparian land, to the extent of taking the water entirely away from the watershed of such stream, provided he there consumed it all, it is a rule inapplicable to our conditions and should not be adopted here. The contention of defendant, carried to its logical conclusion, would make all the lands embraced in a large tract riparian to any one or more of the creeks flowing through it, at the pleasure of the owner, regardless of the lateral extent of the land, and regardless of the natural barriers which divide the entire body into distinct and separate drainage systems, each drawing its natural supply of water from distinct and separate sources. Such an interpretation of the law of riparian rights can find no support from any necessity existing in this state, and would, if adopted, lead to grave abuses, and would result in serious injustice to other riparian owners.

"The word 'riparian' is defined as relating to the bank of a stream or other water—river, lake, or sea; as, riparian proprietors, rights, states": Anderson's Law Dictionary. The Latin word "ripa" means "shore of a river": Anderson's Law Dictionary. Now, can it be said that land whose watershed

does not drain into a stream is riparian to such stream? Does it relate to the stream, or in any sense form part of its bank? Can land be riparian to two creeks whose watershed is entirely different and have no drainage connection whatever?

"The rights of a riparian proprietor, so far as they relate to any natural stream, exist *jure naturae*, because his land has by nature the advantage of being washed by the stream": Lord Seldon in *Lyon v. Fishmonger's Co.*, L. R. 1 App. Cas. 662. But it cannot be said that land lying beyond the watershed of the stream has any such advantage. We think the court erred in holding that defendant could take the water of Santiago ¹⁴-creek beyond its watershed for domestic and stock uses, and did not err in holding that he might not do so for irrigation purposes.

3. It is said that the court erred in failing to find that the defendant should not divert the water of the creek to a point where it would not flow back to the channel above his lower boundary line: Citing *Vernon etc. Co. v. Los Angeles*, 106 Cal. 237. In that case the upper and lower riparian tracts joined each other, and necessarily the upper owner was required to return the water at or above his lower boundary line. In the case here the court found that defendant must return the waters at the upper boundary line or above the lands of plaintiffs. This was sufficient under the facts disclosed in this case.

4. Error is assigned for failure to find the extent of plaintiffs' rights. The court found as to the rights of the parties as riparian owners, but that it "was unable to determine the exact or approximate part or portion of said waters to which the parties herein are each entitled." It seems to be conceded that upon the pleadings the court might have determined this question, but an examination of the transcript fails to show sufficient evidence to have enabled the court to do so. The court could do no more than pass upon the evidence as submitted to it, and if the evidence was insufficient to justify the court in making the proper decree adjusting all the rights of the parties, it could only do as it did, namely, render judgment "with leave to any party herein at any time to bring another action to determine the proportions of said waters to which each is entitled."

5. There are numerous assignments of error in rulings upon evidence, some of which are disposed of by what has already been said. Evidence was excluded that plaintiffs had acquired by prescription all the riparian rights of all the riparian own-

ers below them. These owners were not parties to the suit. The evidence might have been admissible to show the extent of the plaintiffs' rights had the evidence otherwise been sufficient to enable the court to apportion the respective rights of the parties to the suit; but, as the evidence in other respects was insufficient for that purpose, we cannot see that plaintiffs were injured.

¹⁴⁵ The principal errors complained of relate to evidence touching adverse use, estoppel, and abandonment. Evidence was offered that plaintiffs' predecessors in interest posted a written notice at the point of diversion of the water, about a mile below defendant's lower line, making formal claim to the water of the creek. This notice was excluded upon defendant's objection on the ground of its immateriality and that there is no evidence that it is a correct copy. This notice bears date August 5, 1878. The ditch referred to in the notice was in fact taken out and the water was appropriated, and a witness testified that he saw this notice. He also testified that he saw a notice, bearing date November 18, 1878, posted on the door of a house on defendant's land, occupied by one Keith, a tenant of defendant's father, James Irvine. It was directed to James Irvine, George Irvine (who was manager for James), and Henry Keith. It stated, among other things, that "the undersigned claim and have acquired the right to the exclusive use of the water flowing at the head of our ditch in the Santiago creek," and forbade the parties above named from diverting the water above said ditch. This notice was signed by the same persons who signed the formal notice of appropriation first above mentioned. The evidence tends to show that both Keith and George Irvine had knowledge of this notice, but there is no evidence that the then owner of the land, James Irvine, had knowledge of it, or that his manager, George Irvine, had authority to represent him in matters of this kind. It also appeared that this witness went up about a week later to the point where he had before found the water diverted on to defendant's land, and he then found that the water was turned back and was not being diverted, and never was again diverted by defendant's predecessors, or at all, until recently.

I think it may be reasonably inferred from the evidence that defendant's predecessor knew that the water was being diverted to and used upon plaintiff's land, and the court found that no objection was ever made to such use by anyone. It appeared also from the evidence that George Irvine was in-

formed that plaintiffs' predecessors in interest claimed the waters of the creek as they were then using them. One of the appropriators of the water was asked as a witness what conversation ¹⁴⁶ he had with George Irvine with reference to the claim made by plaintiffs to these waters, but the court refused the evidence on the ground that it was immaterial and that it had not been shown that notice to George Irvine would bind his principal. At another point in the trial a witness was called to testify as to what he heard James Irvine, senior, say to his attorney in San Francisco some time about 1878, at which time he consulted his attorney "with reference to his right to use waters of Santiago creek. It was simply a conversation stating facts and speculating as what best to do." Witness was asked the following question by plaintiffs: "Did you hear Mr. Irvine state anything with reference to his intentions in relation to the use or disuse of the waters of Santiago creek?" An objection was sustained to the question as irrelevant and immaterial, and on the further ground that Mr. Irvine was dead (he died in 1886), and it had not been shown that he was fully advised of his exact rights in accordance with the requirements of the Code of Civil Procedure, section 1853. It was stated by counsel that the purpose was to show that Irvine received certain advice from his counsel "with reference to the use of the waters of Santiago creek and in respect to his rights in said waters, and that he made certain declarations after having so consulted with his counsel," and that he spoke of the objections which had been made to the diversion by Keith, referred to in the notice of November 18th. Counsel objected on the same grounds and the added ground that the conversation was privileged, as between attorney and client. As to these matters it is not necessary to speak at length. Posting a notice at the point of diversion by plaintiffs could not strengthen their claim. If it had come to the notice of James Irvine at the time, it was of no more force than notice that plaintiffs had actually appropriated the water. He could no more prevent the one than the other, and neither step conferred any rights against Irvine as the upper riparian owner. And the notice posted on the Keith cabin forbidding Irvine from diverting water would not add to plaintiff's right to divert it. It might have the effect and seemingly succeeded in preventing Irvine from acquiring a right by appropriation, but it could not add anything to any claim of plaintiffs. Nor would ¹⁴⁷ knowledge by Irvine that plaintiffs were using the water,

and claimed the right to use it, be evidence of acquiescence or establish adverse use or constitute matter of estoppel. There is no evidence in the record and none was offered to show that James Irvine, senior, or his successors in interest ever did or said anything which misled plaintiffs in making their diversion, or that they ever expended any money on any representation by Irvine that he would not claim any rights as against them, or had abandoned his rights to them, or had acquiesced in their taking the water to the exclusion of his rights. It may be that Irvine made some declarations to his counsel in the presence of the witness, as already referred to, from which some such inference might be drawn, but we think those declarations, whatever they were, were rightly excluded, if for no other reason than that the court was not informed that they were intended to prove any such state of facts. Before we can say there was error in the ruling some injury should be pointed out. Counsel should have been more specific in explaining to the court what he desired to prove. We can see no error in the rulings or in the findings as to adverse use by plaintiffs, nor can we see any elements of estoppel in the conduct of defendant or his predecessors.

6. Appellant contends that defendant disclaimed in his answer all riparian rights to the waters of the creek, denied all the facts upon which riparian rights depend, and alleged that before the court obtained jurisdiction of his person he had parted with all his title to the property described in the complaint as belonging to him. For these reasons it is urged that the court erred in finding and adjudging that defendant had any riparian rights or is owner of the property. These matters are made the subject of elaborate argument on both sides. We do not feel called upon to set out the various allegations in the complaint and its amendments, and in the answer and its amendments. There is room for argument pro and con of the contention by reason of apparent inconsistencies and denials in the answer. It appears, however, that the cause was tried on the assumption that defendant was the owner of the land at the time the action was brought. Plaintiffs and defendant submitted evidence on that assumption, and the point was not ¹⁴⁸ suggested until upon this appeal. Section 739 of the Code of Civil Procedure provides: "If the defendant in such action [to quiet title] disclaim in his answer any interest or estate in the property, or suffer judgment to be taken against him without answer, the plaintiff cannot recover costs." It is quite clear

that no such disclaimer as is contemplated by this section was made, for plaintiffs had "judgment for their costs herein, taxed at the sum of \$363.45," and are now contending for a still greater amount. We think the court was justified in treating the ownership of the land and the water rights of the respective parties as issues in the case.

7. Plaintiffs filed a cost-bill for \$1,599.75, of which the court allowed \$363.45. Both parties take exception to the allowance and have appealed from the order. The cost-bill was constructed on the conclusion of law found as follows: "That the plaintiffs and defendant each pay one-half of the fees of the reporter, and that plaintiffs recover of the defendant their costs incurred in maintaining the issues as to defendant's taking the whole of the water at his place of diversion, and his taking the water out of the watershed for irrigating, and none others."

Among the items in plaintiffs' memorandum of costs are: 50 cts., notary fees; \$2.75, sheriff's fees; \$38.30, clerk's fees; \$130.70, fees to H. C. Kellogg, and \$130.70 to S. E. Keefer, and \$130.10 to J. P. Leslie, attendance as experts; to J. P. Williams \$26.80 as witness, and \$433.20 to Kellogg and Keefer as surveyors in obtaining data to enable them to compile the maps offered as exhibits by plaintiffs, and for drafting and making said maps and for persons employed to assist them in the surveys. Defendant moved to strike out all the above items, as well as all the others in the memorandum. The court denied the motion as to the notary's, clerk's, and sheriff's fees and witness fees of Williams, and reduced the expert's fees of Kellogg and Keefer to \$26.70 each, and Leslie's to \$27.10, and allowed one-half the item of \$433.20 to Kellogg and Keefer as surveyors in obtaining data to prepare maps, and granted the motion as to other items. The evidence was that the maps referred to were not made under direction of defendant, but were prepared by direction of plaintiffs alone, and defendant ¹⁴⁰ made no use of them except as exhibits at the trial offered by plaintiffs. It appeared that the experts were not acting under direction of the court. It also appeared that defendant paid one-half of the reporter's fees in the course of the trial, which was in accordance with the order of the court.

The witnesses called by plaintiffs as experts were entitled to fees for daily attendance and for mileage as witnesses. They were not entitled to be paid as experts, nor for the expenses incurred by them in making surveys or preparing maps. It

was, therefore, error to allow one-half the item of \$433.20, and to allow fees as experts: *Faulkner v. Hendy*, 79 Cal. 265; *Miller v. Highland etc. Co.*, 91 Cal. 103. These are the only items of cost-bill called to our attention in defendant's brief, although all the items are included in his motion.

In the outcome of the suit plaintiffs failed in their principal contention, and prevailed upon the question of defendant's right to take water beyond the watershed for irrigation purposes, but failed as to his right to so take it for domestic and stock purposes. Upon these two questions we have held that the trial court was correct as to the first, but erred as to the second. The theory of the trial court in adjusting the cost-bill seems to have been to award costs to plaintiffs only for expenditures in maintaining the two issues in which they prevailed. If there were costs also properly chargeable to defendant arising out of the erroneous ruling of the trial court pointed out in this opinion, they should be given to plaintiffs.

It is impossible for us to say from the evidence what these costs should be. Plaintiffs complain that the court struck out a number of items in their cost-bill aggregating quite a large amount, and they claim that the evidence of witnesses whose fees are disallowed gave testimony directly bearing upon the issues found in plaintiffs' favor. This may be so, and it may also be true that the survey work done and the preparation of the maps used at the trial contributed materially to a proper decision of the case. But section 1025 of the Code of Civil Procedure leaves the determination of the question of costs to the discretion of the trial court, and it has been decided here that the prevailing party in a case like this is not necessarily entitled to costs: *Abram v. Stuart*, 96 Cal. 235. This ¹⁵⁰ section, however, would not justify the court in allowing costs not properly chargeable as such, as in the instance above noted for surveying and making maps at the instance of one of the parties not acting under direction of the court.

The judgment should be modified so as to enjoin defendant from taking water for any purpose whatever beyond the watershed of Santiago creek. As thus amended the judgment should be affirmed, with directions to retax the cost-bill in accordance with the views herein suggested.

For the reasons given in the foregoing opinion the judgment is modified so as to enjoin defendant from taking water for any purpose whatever beyond the watershed of Santiago creek. As

thus amended the judgment is affirmed, with directions to re-tax the cost-bill in accordance with the views herein suggested.

Garoutte, J., Harrison, J., Van Dyke, J.

Hearing in Bank denied.

RIPARIAN OWNERS—RIGHT TO DIVERT WATER.—A riparian proprietor has no right to divert a stream, or any part of it, from its accustomed course, to the injury of other persons: *Burwell v. Hobson*, 12 Gratt. 322, 65 Am. Dec. 247; although he may, by virtue of his position upon the stream, appropriate the whole of it, as against lower proprietors, for domestic and culinary purposes and other natural wants, if his needs require it: See extended note to *Heath v. Williams*, 48 Am. Dec. 274, discussing riparian rights, and showing the doctrine of appropriation peculiar to the Pacific states and territories. A land owner has the right to change the channel and divert the water in a stream flowing through his land, if he returns it to the original channel before it reaches the land of the proprietor below: *Missouri Pac. Ry. Co. v. Keys*, 55 Kan. 205, 49 Am. St. Rep. 249, and note.

RIPARIAN OWNERS—ADVERSE USER.—NONUSER by a riparian proprietor does not impair any of his rights in the water of the stream, nor confer any adverse rights upon another: Note to *Heath v. Williams*, 48 Am. Dec. 274.

RIPARIAN RIGHTS—IRRIGATION.—The right of a riparian proprietor to the use of water for irrigation is among the last of his riparian rights, and cannot be extended even by implication. It must always be held in subordination to the rights of all other riparian owners to the use of the water for the supply of the natural wants of man and beast, extended to the occupants of each and every tract held as an entirety, bordering upon the stream, whatever its extent: *Alta etc. Water Co. v. Hancock*, 85 Cal. 219, 20 Am. St. Rep. 217, showing to what land riparian rights extend.

COSTS—ITEMS NOT RECOVERABLE AS.—The fees of experts are not proper items of a cost bill, nor are the expenses of making surveys and plans needed in preparing a case for trial, even where the plans were used on the trial: *McDonald v. Burke*, 2 Idaho, 995, 35 Am. St. Rep. 276, and note.

DOEG v. COOK.

[126 California, 218.]

MUNICIPAL CORPORATIONS—OFFICERS OF—LIABILITY.—When the duty of a municipal officer is plain, certain, and imperative, involving no exercise of discretion, he is answerable for its negligent performance, or nonperformance, at the suit of any person who is specially injured thereby.

MUNICIPAL CORPORATIONS—FAILURE TO KEEP HIGHWAY IN REPAIR—LIABILITY OF OFFICERS.—Town trustees and a town marshal, acting ex officio as street commis-

sioner, are jointly liable in damages for an injury caused to the plaintiff, on a dark night, by falling into a culvert, which such officers negligently permitted to remain open and in a dangerous condition without railing or protection, where it was the plain and certain duty of such officers to keep the highway in safe repair.

JOINT LIABILITY—CONCURRENT NEGLIGENCE.—IF DIRECT PERSONAL INJURY is occasioned by the separate but concurrent negligence of two or more parties at one and the same time, an action will lie against one and all of them.

PARTIES DEFENDANT—PROPER JOINDER OF.—As a town marshal and town trustees may be joined in an action for damages for an injury caused by their separate but concurrent negligence, and as an official and his sureties may be joined in the same action, it is proper to join the marshal, his sureties, and the trustees as parties defendant in the action for such injury.

B. F. Thomas, for the appellant.

W. E. Shepherd, Shepherd & Eastin, and Blackstock & Ewing, for the respondents.

215 HENSHAW, J. This action was brought to recover damages for personal injuries sustained by plaintiff by falling into a culvert on a public highway of the town of San Buenaventura. The defendants are the town marshal, who is also ex officio street commissioner, his bondsmen, and the individuals composing the board of town trustees. The charge in the complaint is, that the marshal and the trustees, whose duty it was to maintain the highway in good repair, negligently suffered and permitted the culvert to remain in an open and dangerous condition without railing or protection, and they permitted a railing, which had been erected to guard against the dangers of the culvert, to be removed and failed negligently to replace it. The plaintiff, upon a dark night, fell into the culvert and sustained injuries in compensation for which he brings this action. By the charter of the town it is declared that "the trustees have the power to provide for the opening, lighting, and keeping in good repair streets and alleys," etc.: Stats. 1875-76, p. 535, subd. 17. By subdivision 10 of the same act the marshal "shall perform the duties of street commissioner, and be governed by the provisions of this act, and such regulations or ordinances as the board of trustees may adopt relative thereto." Plaintiff further pleaded an ordinance of the town by which the street in question was declared to be a regularly graded, open, and accepted public street, "and it is hereby declared to be the duty of the street commissioner to keep the same open and in good repair as such."

216 This complaint was demurred to upon grounds both

general and special. The demurrer was sustained, and from the judgment entered thereon plaintiff appealed.

It is first insisted in support of the demurrer—and this may be said to be the principal question in the case—that the complaint states no cause of action because an action will not lie against public officers such as these for injuries resulting from their mere negligent omission. It is well settled in this state that generally an action will not lie against a municipal corporation for the misfeasance, malfeasance, or nonfeasance of its officers: *Huffman v. San Joaquin Co.*, 21 Cal. 426; *Winbigler v. Los Angeles*, 45 Cal. 36; *Chope v. Eureka*, 78 Cal. 588, 12 Am. St. Rep. 113; *Arnold v. San Jose*, 81 Cal. 618; and, if the position of respondent is sound upon this contention, it must result that an injured party, under circumstances such as these, has no redress whatsoever. Upon the question thus presented, it must at once be conceded that there is a conflict in authority, but the very decided trend of modern decision is to hold such officers liable for acts of nonfeasance, or for the negligent performance of a duty when the duty is plain, when the means and ability to perform it are shown, and when its performance or nonperformance, or the manner of its performance, involves no question of discretion. In short, where the duty is plain and certain, if it be negligently performed, or not performed at all, the officer is liable at the suit of a private individual especially injured thereby. *Shearman and Redfield on Negligence*, third edition, section 156, thus state the rule: "The liability of a public officer to an individual for his negligent acts or omissions in the discharge of an official duty depends altogether upon the nature of the duty to which the neglect is alleged. Where his duty is absolute, certain, and imperative, involving merely the execution of a set task—in other words, is simply ministerial—he is liable in damages to anyone specially injured, either by his omitting to perform the task, or by performing it negligently or unskillfully. On the other hand, where his powers are discretionary, to be exerted or withheld according to his own judgment as to what is necessary and proper, he is not liable to any private person for a neglect to exercise those powers, nor for the consequences of a lawful ²¹⁷ exercise of them where no corruption or malice can be imputed, and he keeps within the scope of his authority." In *Robinson v. Chamberlain*, 34 N. Y. 389, 90 Am. Dec. 713, the question is considered at length and many cases reviewed. It is there said: "In *Adsit v. Brady*, 4 Hill, 630, 40 Am. Dec.

305, the broad rule is laid down that 'when an individual sustains an injury by the malfeasance or nonfeasance of a public officer, who acts or omits to act contrary to duty, the law gives redress to the injured party by an action adapted to the nature of the case.' This is a healthful rule, sound entirely in public policy, if as a rule of law it can be questioned. As a rule of law, as there applied, it has stood for nearly a quarter of a century, and I think should continue." Without further quotation of authorities upon the question, it will be sufficient to refer to the instructive note to *County Commrs. v. Duckett*, 83 Am. Dec. 557, where the liability of road officials for negligence in repairing and maintaining public highways is elaborately considered, and to *Wharton on Negligence*, sections 285, 286, and *Elliott on Roads and Streets*, 506.

We conclude, therefore, that in proper cases—and this assuredly is one—such liability upon the part of a public officer exists. Further, we think that the circumstances under which such liability will attach are sufficiently shown by this pleading. The duty upon the part of the trustees to keep the highways in repair is correlative with the right accorded them by the charter to provide for the opening, lighting, and keeping in good repair the streets of the municipality. Upon the part of the marshal, it appears that he was *ex officio* street commissioner, charged with the duty of street commissioner under the law, and with such duties as might be imposed upon him by the board of trustees of the town, and that by the ordinance the special duty was imposed upon him of keeping this particular street in good repair.

Further grounds of demurrer were improper joinder of parties defendant, and the misjoinder of causes of action. Herein it is urged that the trustees' negligence, if negligence could be imputed to them, was not joint with the negligence of the marshal; that the marshal and the trustees were in no sense fellow delinquents or joint tortfeasors, and the causes of action²¹⁸ were separate. Still further it is urged that, while it was permissible to join the marshal's bondsmen in an action against him for official negligence, the trustees were improperly joined as defendants with those bondsmen. It is unquestionably the rule that an action cannot be maintained against several defendants jointly for damages when there has been no concert of action or unity of design amongst them. But, upon the other hand, where direct personal injury is occasioned by the separate but concurrent negligence of two parties at one and

the same time, an action will lie against one and all of them, and it is such an action as is here being prosecuted: *Tompkins v. Clay Street R. R. Co.*, 66 Cal. 163; *Colegrove v. New York etc. R. R. Co.*, 20 N. Y. 492, 75 Am. Dec. 418; *Klauder v. McGrath*, 35 Pa. St. 128, 78 Am. Dec. 329; 17 Am. & Eng. Ency. of Law, 602, 603.

It has been settled in this state since the case of *Van Pelt v. Littler*, 14 Cal. 194, that a plaintiff need not first recover judgment against an official before proceeding against the sureties upon his official bond, but that the official and his sureties may be joined in the same action. Since in this case it was proper for plaintiff to unite the marshal with the trustees, and since also it was proper to unite the sureties with the marshal, it is not perceived that either the trustees or the sureties have any just cause of complaint because they are both impleaded. If the result of the litigation should be to exonerate the trustees, the presence of the sureties as defendants would not affect them. If, upon the other hand, the result of the litigation should be to hold the trustees liable and exonerate the marshal, the sureties would go out of the case with their principal, and this could not affect the trustees. If, again, judgment should be rendered finding both the marshal and the trustees liable, there could be but one satisfaction, and, so far as the sureties are concerned, the recovery would be limited to the amount of their official bond, but it could not be injurious to the trustees to have the judgment to the extent of the bondsmen's liability satisfied by them.

It is unnecessary to discuss the question of the validity or invalidity of section 23 of the Vrooman act (Stats. 1885, p. 161), since, as has been said, the duty of the defendants, as trustees and as street commissioner, is clearly established by the charter.

The judgment appealed from is reversed and the cause remanded, with directions to the court to overrule the demurrers.

219 Temple, J., concurred.

Hearing in Bank denied.

MUNICIPAL CORPORATIONS—OFFICERS OF—LIABILITY.
A civil action lies for neglect of official duty, ministerial in its nature, at the suit of the party injured thereby: *Wilson v. Mayor*, 1 Denio, 506, 43 Am. Dec. 719, and note showing that municipal officers may be held criminally liable for a culpable neglect to repair a street, where they are invested with power to keep the streets

in order: Compare note to *Goddard v. Harpswell*, 80 Am. St. Rep. 384, as to liability for injuries sustained in falling through a bridge which was part of a public street.

JOINT LIABILITY—CONCURRENT NEGLIGENCE.—If the concurrent negligence of two or more persons results in the injury of a third person, each is answerable therefor: *Carterville v. Cook*, 129 Ill. 152, 16 Am. St. Rep. 248, and monographic note thereto, discussing the subject. See, also, notes to *Gonzales v. Galveston*, 31 Am. St. Rep. 21; *Pugh v. Chesapeake etc. Ry. Co.*, 72 Am. St. Rep. 397.

EX PARTE CLARKE

[126 California, 285.]

CONSTITUTIONAL LAW—PRODUCTION OF BOOKS AND PAPERS—SANCTITY OF PRIVATE RIGHTS.—To compel a person to deliver his books and papers to another, who does not claim any ownership in them, is to violate the sanctity of most important private rights, and is not to be tolerated except when warranted by some law clearly not inconsistent with that provision of the constitution which prohibits unreasonable seizures and searches.

CONSTITUTIONAL LAW—PRODUCTION OF BOOKS AND PAPERS—WHAT SHOWING IS REQUIRED.—A party to a pending action has no right to call for the books, papers, and documents of his adversary merely for the purpose of entering into a "fishing examination" of them. To support their production, there must be a substantial showing that the book, paper, or document sought for contains material evidence in support of the cause of action or defense of the party asking for it. A mere suspicion that it contains such evidence does not warrant an order for its production.

CONSTITUTIONAL LAW—PRODUCTION OF BOOKS AND PAPERS—ORDER VOID FOR WANT OF AFFIDAVIT.—An order of court to compel a witness to produce books and papers is unauthorized and void, where there is no showing, by affidavit or otherwise, that they contain any evidence material to the cause, especially where there is positive testimony that they do not contain such evidence.

CONSTITUTIONAL LAW—PRODUCTION OF BOOKS AND PAPERS—COMMITMENT FOR CONTEMPT—HABEAS CORPUS.—A witness committed for contempt in disobeying an order of court requiring him to produce books and papers which he cannot be legally required to produce will be discharged on habeas corpus, for such an order is void.

Petition to the supreme court for a writ of habeas corpus, to discharge the relator, who had been imprisoned for contempt by order of the superior court of the city and county of San Francisco.

J. J. Burt, for the petitioner.

Gordon & Young, for the respondent.

236 McFARLAND, J. The petition herein sets forth that while a certain cause entitled Charles Erickson, doing business under the name of Charles Erickson & Co., plaintiff, v. Stockton & Tuolumne County Railroad Company, a corporation, defendant, was on trial in the superior court, the petitioner herein was called as a witness for the plaintiff in said cause and testified that he was the secretary of the defendant therein, and had charge of said defendant's books; that the issues in said cause were those presented by the pleadings therein which are attached to and made a part of the petition; that petitioner, as secretary of said defendant, upon notice served by plaintiff, had produced on the trial the minute-book of defendant, which contained all the meetings and proceedings of the board of directors and stockholders of said defendant; that petitioner had testified what other books said defendant had, to wit, a ledger, a journal, a stock ledger, a stock journal, a stock certificate book, and a petty cash-book, and that there was nothing in said books showing that the defendant had anything to do with the grading of a certain roadbed which was the subject of the action; that thereupon the attorney for the plaintiff in said action requested the court to instruct the petitioner herein to bring into court all of said books and that the said attorney, being asked by the court what he expected to prove by the books, said "that he expected to prove by said books that said corporation had **237** been engaged in grading said roadbed on its own account," but that "no evidence was offered or introduced, or any showing made in said action, to the effect that any of said books, or any part thereof, were or was material or pertinent to any of the issues in said action"; and that thereupon "said court, as requested aforesaid, instructed your petitioner to produce all of said books in said court." It further appeared from the petition that the petitioner declined to produce said books, and stated that he had been instructed by the directors of said corporation and its president, Mrs. Annie Kline Rickert, not to take any books of said defendant out of its office, and also stated that if plaintiff's attorney would designate what parts of any of said books he desired to introduce in evidence he would give certified copies of such parts as were material or pertinent; and that thereupon the court adjudged the petitioner guilty of contempt for not producing said books, and committed him to the custody of the sheriff of the county, Henry S. Martin, until he should

produce said books, and that he is deprived of his liberty by said Martin under said order.

The return to the writ shows substantially the facts set out in the petition, except as to the declared purpose of the attorney of the plaintiff in requiring the books. The commitment, which is part of the return, recites that the attorney for plaintiff moved for the books "for the purpose of proving by said books the general course of business of said defendant corporation, and for the purpose of proving by said books that the said Annie Kline Rickert, president of said defendant corporation, had full power and authority to make contracts for and on behalf of said defendant corporation and as its agent, and for the purpose of further proving who were the stockholders of said defendant corporation at all times since its organization, and more particularly on the fifth day of March, 1898." It merely appears that the counsel for plaintiff "moved for an order"; there was no affidavit upon which the order was founded, nor does anything appear as the foundation of the order except the testimony of Clarke, the petitioner himself, while he was a witness for plaintiff; and his entire testimony is before this court in accordance with the stipulations of the parties that it might be used on the hearing of this writ so far as it could be looked into by this court.

²⁸⁸ Under the views which we take of the case we do not think it necessary to consider the petitioner's contention that, as the statute requires that the books of the corporation should be kept in its office, the petitioner could not be required to remove them from such office, as was held in *La Farge v. La Farge Fire Ins. Co.*, 14 How. Pr. 26. Neither will we consider whether or not petitioner, as a mere officer of the corporation, could be compelled, as against the orders of the authorities of the corporation, to produce its books in court, nor how a corporation could be proceeded against upon its refusal to produce a document which it ought to produce. For the purposes of this case, we will consider the petitioner as if he were bound to produce the books of the corporation in a proper case, as if he stood in the place of any individual or business firm who was a party to the action, and as if the question were whether a party to an action could be deprived of his liberty for violating such an order as that here presented for consideration.

The question here presented is of great importance to all citizens, for it involves the constitutional right of the people to "be secure in their persons, houses, papers, and effects against

unreasonable seizures and searches": Const., art. 1, sec. 19. To compel a person to deliver his books and papers to another who does not claim any ownership in them is to violate the sanctity of most important private rights and is not to be tolerated except when warranted by some law clearly not inconsistent with the constitutional provision. As was said by Lord Camden in the celebrated case of *Entick v. Carrington*, 19 How. St. Tr. 1066, which was an action to recover damages for breaking into a private house and seizing private papers: "Papers are the owner's goods and chattels; they are his dearest property, and are so far from enduring a seizure that they will hardly bear an inspection; and though the eye cannot, by the laws of England, be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of these goods will be an aggravation of the trespass." The privacy of private books and papers is not only of inestimable value to the owner on account of various personal and sentimental reasons, but is of the greatest value also from mere business considerations; the exposure of a man's methods of business would frequently be highly injurious to him, and, although really solvent, might produce such embarrassments as would ruin him. His right, therefore, to the sole possession and knowledge of his private books and papers is not to be violated, except where the power to do so clearly appears. In many of the states there are statutes on the subject of the production of books and papers in court during a trial and providing in detail under what circumstances orders for their production may be made. In this state about all there is on the subject is to be found in sections 1000 and 1985 of the Code of Civil Procedure. Section 1000 provides for an order, in certain cases, upon notice, that a party to a pending action may have an "inspection" and copy of accounts in any book or of a document or paper "containing evidence relating to the merits of the action or the defense therein," and prescribing a certain penalty for a refusal; and there is a provision at the end of the section that it shall not be construed "to prevent a party from compelling another to produce books, papers, or documents when he is examined as a witness"; but the proceeding in the case at bar was not under that section, and, moreover, it is applicable only to proper cases—for no one would claim that it gives unbridled license for the examination or production of all such private papers as the caprice, or curiosity or ulterior design of a party might suggest. Section 1985 provides for what is usually called

a subpoena duces tecum, by which a witness is required to bring with him any books, documents, etc., "which he is bound by law to produce in evidence"; but the proceedings in the case at bar were not under that section, and, moreover, it does not prescribe what things he is "bound by law to produce." It may be assumed, however, that—although we have no express affirmative statutory provisions on the subject—when a witness is in court, no matter how brought there, and discloses the fact that he has a paper, document, or book which would be evidence in favor of the party desiring it, he may, in a proper case, be rightfully ordered to produce it. But it is evident that we must look to general principles of law applicable to the subject when it is to be determined in what instances a court has the power to compel a witness to give up his books and papers and disclose his private business to the world. And ²⁴⁰ the question raised here is one of power in the court, and may be inquired into on habeas corpus. Indeed, there is no other way in which a party deprived of his liberty as petitioner was could recover his freedom. The same principle applies as when a witness has been imprisoned for contempt for not answering a question not legal or pertinent, and it has been held by this court that in such a case he will be discharged. In *Ex parte Brown*, 97 Cal. 83, the petitioner had been ordered to produce a package of tickets and had been sent to jail for refusing to do so, and this court discharged him on habeas corpus, and said that: "It is the settled law of this state that no court or judge has power to punish as a contempt the violation or disregard of an unlawful order." In *Ex parte Zeelandelaar*, 71 Cal. 238, the petitioner had been imprisoned for contempt for not answering as a witness a question not legal or pertinent to the issue, and he was discharged on habeas corpus. Several concurring opinions were delivered in the case; and it was held not only that the petitioner could not be punished for refusing to answer the question, but that the commitment must show affirmatively that the question was legal and pertinent to the issue: See, also, *Ex parte Rowe*, 7 Cal. 181. And a witness can no more be lawfully imprisoned for refusing to produce papers and books which he cannot be legally required to produce, than he can be for refusing to answer questions not proper to be asked.

In the case at bar, we are satisfied that the order in question was unauthorized. There was no showing by affidavit or otherwise that the books in question contained any evidence ma-

terial to plaintiff's cause; the only evidence on the point was the testimony of petitioner when on the witness stand as plaintiff's own witness, and that showed that they did not contain such evidence. In *Morrison v. Sturges*, 26 How. Pr. 179, the court say: "It is not enough that the party believes or is advised that the paper contains material evidence. Facts must be shown to support such belief." Moreover, it was in effect a general omnibus order for the production of all defendant's books, which has always been held to be unauthorized; for, while it named certain books, yet those constituted all of defendant's books, as appears from plaintiff's examination of petitioner as ²⁴¹ to what books the defendant had. Again, the order was in the nature of what Lord Chancellor Hardwicke, over a century ago, called "a mere fishing bill," and such bills have been universally condemned. It is quite evident that these books were not required to be produced for the direct purpose of introducing them in evidence. Plaintiff would not have offered them or any part of them in evidence unless he found something in the part offered that was relevant and material in support of his side of the case; and, indeed, they would not have been otherwise admissible. He merely intended to draw his drag-net of inspection through all these books under the ostensible motive of trying to catch something which his witness had testified was not there. In the meantime, all the private business of the defendant—all its dealings with persons other than plaintiff, its methods of conducting its affairs, perhaps its financial condition and other matters vitally important to its welfare—would have been exposed. There is no warrant in the law for such a forcible wholesale violation of a person's privacy upon such a showing as was made in this case. A man does not lose all his civil rights because he is brought into court as a party to a suit. As was said by Lord Hatherley: "A court is bound to protect the defendant against undue inquisition into its affairs": L. R. 7 Ch. App. 97, and note; and it would be difficult to imagine a more striking instance of such "undue inquisition" than an order compelling a defendant to produce for inspection all his books upon the mere suspicion—against positive evidence to the contrary—that they might possibly contain some evidence favorable to the plaintiff, and without pointing to any particular part of all these books over which this suspicion was supposed to hover.

The authorities on the subject are innumerable. Many of them arose out of discussions of the old "bill of discovery,"

and many out of later statutory provisions; but the principles which they declare are clearly to the point that such an order as is here under review is unauthorized. Originally, an order for the production of a paper, document, or book was made only when the document was one declared on in the bill or set up as a defense; or where the party asking for it had an interest in the document itself—as where it was a contract between ²⁴² the parties, and there was only one copy of it which was in the hands of the opposite party; or where the instrument was, in the very nature of things, material evidence, as where it was alleged to have been forged or altered, and that it would on its face show the fact alleged; or where books belonged to both parties and would necessarily contain evidence of the issues pending—as in case of a suit between partners, or generally between principal and agent or trustee and beneficiary: See 2 Phillips on Evidence, Cowen & Hill's and Edwards' notes, c. 4, *321, and notes. Afterward, such orders were undoubtedly extended so as to include other grounds for production of papers, and were in many states, as hereinbefore noticed, regulated by statutes and rules of court; but the principles applicable generally to the forced production of papers are declared in the authorities as above stated, and we have been referred to no case warranting such an order as the one now under review. The subject, in all its bearings, both at common law and under recent statutes, is fully discussed in 2 Wait's Practice, commencing at page 522, where a very large number of authorities touching the question are cited. Many cases are there cited to the point that there must be a substantial showing that the document or book sought for contains material evidence in support of the cause of action, or defense, of the party asking for it; and that such a mere suspicion as appeared in the case at bar will not warrant an order for the production. But the principle which is determinative of the invalidity of the order involved in the case at bar is stated on page 533, where the author says: "The right given by statute to discover books, papers, and documents relating to the merits of a pending action does not entitle a party to enter into a mere fishing examination of all the books, papers, and documents of his adversary. An inquisitorial examination was not contemplated by the framers of the statute": Citing authorities. In Hoyt v. American Exchange Bank, 8 How. Pr. 93, the court said: "He has no right to have a general inquisitorial examination of all the books, papers, and documents of his ad-

versary with a view to ascertain if, perchance, something cannot be found which will probably aid him." There are numerous other authorities to the same point.

²⁴³ In the case at bar, if we were to confine ourselves entirely to the commitment itself, the conclusion above stated would be the same. It was recited there that the plaintiff moved for the books for the purpose of proving by them "the general course of business of said defendant corporation"; and this is as complete an expression of an intent to go upon a general fishing expedition as could possibly be imagined. Another recital is, that the books were wanted for the "purpose of proving" that Mrs. Rickert had "full power and authority to make contracts for and on behalf of said defendant corporation as its agent"; but there is no evidence that the books sought for would have afforded any evidence of that kind, and plaintiff had already introduced from the minute-book a resolution of the board of directors to that effect; and, moreover, the averment of the complaint was that the defendant in the case held out Mrs. Rickert as their "ostensible agent." The other recital was that plaintiff wanted the books for the purpose of proving "who were the stockholders of said defendant corporation at all times since its organization, and more particularly on the fifth day of March, 1898"; but the suit was against the corporation and not against the stockholders, and it was immaterial who the stockholders were, and it was unimportant to plaintiff to know who the stockholders were unless they desired the information for the purpose of a future suit, which is in no case allowable. Moreover, the order is not confined to the stock-book.

For the reasons above stated we are of the opinion that the order for the violation of which the petitioner was imprisoned was void, and that therefore he should be discharged from custody. This conclusion is based entirely upon the order here reviewed. Under what circumstances a proper and authorized order could be made for the inspection, or for the production at the trial, of a paper, document, or book, is a question not now before us.

The petitioner is discharged.

Van Dyke, J., Temple, J., Henshaw, J., and Harrison, J., concurred.

CONSTITUTIONAL LAW—COMPELLING PRODUCTION OF BOOKS AND PAPERS—CONTEMPT.—A court may compel the production of the books of a party, to be used in evidence on the

trial by his adversary, upon a proper showing that they contain entries tending to prove the issues. But it has no right to compel the production of a party's books and papers for general inspection or examination for fishing purposes. An order by which his books are taken from his custody and committed to that of a third person for an indefinite period of time for an inspection generally into all his affairs by the opposite party and his counsel, with leave to take copies of the entries therein, is unwarranted by the law, amounts to an unlawful deprivation of his property rights, and is in palpable violation of his constitutional right to be secure against unreasonable seizure of his papers and effects. A defendant who disobeys such an order is not liable to attachment as for a contempt: *Lester v. People*, 150 Ill. 406, 41 Am. St. Rep. 876. Appended to this case is a monographic note on the power to compel a party to produce books and papers as evidence and for the examination of his adversary.

HABEAS CORPUS—VOID ORDER.—One imprisoned for violating an order or judgment in excess of the jurisdiction of the court rendering it may be discharged on a writ of habeas corpus: *Ex parte Arnold*, 128 Mo. 256, 49 Am. St. Rep. 557; *In re Fanton*, 55 Neb. 706, 70 Am. St. Rep. 418.

GEORGE v. LOS ANGELES RAILWAY COMPANY.

[126 California, 357.]

INSTRUCTIONS—MISLEADING AND IRRELEVANT.—Instructions which tend to mislead are erroneous, but all irrelevant instructions are not misleading. Thus, an incomplete instruction apparently outside the issues is not misleading, where the jury have been fully instructed as to the law applicable to the facts in the case.

NEGLIGENCE OF CHILDREN—PRESUMPTION—CONTRIBUTORY NEGLIGENCE.—There is no presumption of law that a boy nine years of age, injured while playing around and with trailer-cars left by a street railway company at the end of its line in a city, did not have capacity to understand that it was dangerous for him to go in front of a moving car, and it is, therefore, proper to leave to the jury the question of his contributory negligence in so doing free from any such presumption.

INSTRUCTIONS UPON IRRELEVANT QUESTION—EFFECT OF, UPON OTHER INSTRUCTIONS.—In an action against a street railway company for injuries occasioned to a boy while playing around and with trailer-cars, left on a street by the company, an instruction that the right to so use the street must come from the city, which is an irrelevant and immaterial question, does not weaken the force of other instructions as to the care required of the defendant in so occupying the street.

INSTRUCTIONS—INCONSISTENCIES.—A party cannot complain of an instruction which is a correct statement of the law, although it is not consistent with other instructions given, which were more favorable to him.

NEGLIGENCE AS TO CHILDREN—CARS AS “DANGEROUS MACHINES”—“TURNTABLE” CASES.—Trailer-cars, left standing by a street railway company on a track in the street when not in use, and secured by ordinary brakes, are not “dangerous machines,” within the meaning of the “turntable” cases, the consequences of meddling with which are not supposed to be fully comprehended by infant minds, although the cars are attractive to children, and may be left in a condition which makes it possible for them to loosen the brakes and push the cars along the track, thus putting the children in danger.

NEGLIGENCE—INJURY TO CHILDREN—TRAILER-CARS—PROPER INSTRUCTION—“TURNTABLE” CASES.—In an action against a street railway company for injuries to a boy nine years of age, while playing around and with trailer-cars left on a street by the company, it is proper to instruct the jury that, if they believe from the evidence that the element of danger connected with the trailers was not a hidden or concealed danger, but was open to the observation, and could be comprehended by a boy of the plaintiff's age, with average intelligence, then, in such case, if the defendant's cars were held by brakes of the ordinary kind, and the brakes were set in a manner to hold the cars where they were left, unless some one loosened them, the plaintiff cannot recover; and such an instruction takes the case out of the class to which the “turntable” and like cases belong.

TRIAL—SUBMISSION OF ISSUES.—Under a statute authorizing the court to instruct the jury “to find upon particular questions of fact to be stated in writing,” if the jury render a general verdict, the court is not required to thus submit all the issues. It is a matter resting in its discretion.

T. E. Gibbon and J. H. Crimminger, for the appellant.

Bicknell, Gibson & Trask, for the respondent.

300 CHIPMAN, C. Action for personal injuries. The jury found a general verdict for defendant. Against plaintiff's objection, the court submitted certain questions to the jury, the answers to which were favorable to defendant.

The appeal is from an order denying plaintiff's motion for new trial. The evidence disclosed the following facts:

The defendant was, at the time of the accident, engaged in **300** operating a street railway on Pasadena avenue, in East Los Angeles; for two days preceding the accident the defendant had left seven or eight small cars, commonly known as “trailers,” at the end of said line, at the junction of Pasadena avenue and Daly street; it was the custom of the company to use these cars during the hours of time when there was the heaviest travel, and during the interval were left, for convenience, at said point. Pasadena avenue was the most generally used public thoroughfare in East Los Angeles; one of the public schools of the city was within one block of this point and another within three blocks, and fully one-half of the pupils at these schools passed

this place in going to and from these schools; these trailer-cars were left at the point in question by the employ  s of the defendant after being used by them in the morning, and were pushed up to the end of the line beyond the point where the cars turned back, and the brakes were properly set to hold them and were the only means taken to hold the cars in place; the brake was operated by turning a crank with a short arm and handle, to be turned by one hand, and was held by a "dog," that caught in a ratchet wheel on the top of the floor of the platform of the car; a kick with the foot against the "dog" would easily loosen the brake; the persons engaged in operating the regular cars came to this point about every fifteen minutes during the day. On the day of the injury a number of boys, including the plaintiff, left one of the public schools a few minutes after 3 o'clock P. M., and, on arriving at the cars, began to play with them by pushing them a short distance up the track, starting them down the grade and jumping on and riding back; after they had been playing about half an hour they started down, as usual, with two cars, the plaintiff standing on the step running along lengthwise on the side of the front car. He rode down part of the distance in this way, when he jumped from the step of the car to the ground and ran from ten to twenty feet ahead of the car, and started across the track in front of it, when his foot was caught by a splinter of wood projecting above the ground from one of the cross-ties, which caught in his shoe, throwing him to the ground, and before he could extricate himself he was caught and run over by the forward car. Plaintiff had not been on the cars in question ³⁶¹ before the afternoon on which the injury occurred, and one of the boys testified that he warned plaintiff to keep off the cars; the grade at the point in question was very slight, and the cars, when started back, came very slowly, and he would have had ample time to get across the track before the car overtook him if he had not been thrown down by the splinter catching in his shoe; plaintiff was of the age of nine years and nine months. About 2:45 or 3 o'clock P. M., and before the accident, the employ   of defendant in charge of the trailer-cars was at the cars and found two boys playing with them, and that the brake of one of the cars was unloosened, but all the other brakes were set; he made the boys leave the cars and he set the loose brake.

Appellant confines his argument exclusively to alleged erroneous instructions.

The court gave six instructions as asked by plaintiff, with some modifications as to two of them not now objected to. These instructions were quite favorable to plaintiff, and we do not understand that plaintiff questions their correctness. His contention is, that the court gave certain instructions at request of defendant, two of which (11 and 12) are contradictory of and inconsistent with the instructions given for plaintiff, and do not correctly state the law; that instructions 1 and 2 are outside the issues; that instruction 10 is misleading, and that instruction 8 does not state the law correctly.

Defendant's instructions 1 and 2 were that "street railway companies are not required to use the same care to avoid injuring persons who are not passengers as they are to avoid injury to persons who are passengers"; and that "the plaintiff was not a passenger, nor entitled to the rights of a passenger, when the injuries of which he complains were received." We suppose these instructions were given because there was evidence that plaintiff was riding on the trailer-cars. The jury were not told what the defendant's liability was to passengers, and to inform the jury that plaintiff was not entitled to the rights of passengers left the instruction incomplete. It was apparently outside the issues. Still, we cannot see how it could have misled the jury, especially as they were fully instructed as to the law applicable to the facts in the case. The rule invoked by plaintiff does not go so far as to make all irrelevant instructions ^{see} error. It must appear that they at least tended to mislead.

Instruction 8 was as follows: "There is no presumption of law that plaintiff did not have capacity to understand that it was dangerous for him to go in front of a moving car; and, unless the evidence shows that he did not have such capacity, contributory negligence on his part, if shown by the evidence, is a good defense to the action."

We are asked to hold to the rule of the common law that minors under the age of fourteen years are presumably without discretion and judgment, and that evidence is necessary to remove the presumption. It was proper to leave the question of contributory negligence to the jury free from any presumption as to plaintiff's incapacity. The only testimony as to the fact was given by the plaintiff's mother, who said that he "was not a particularly bright or intelligent child." The law upon the point is stated in *Studer v. Southern Pac. Co.*, 121 Cal. 400, 66 Am. St. Rep. 39.

Instruction 10 was as follows: "Whether the defendant's trailer-cars should have been permitted to stand on the track in the street during the hours of the day when they were not needed for carrying passengers, was a question to be determined by the city authorities, and is a wholly irrelevant and immaterial question in this case."

It is objected that this instruction was confusing and misleading to the jury, because they had been previously told that the questions of the manner of leaving the cars, the place where they were left, etc., were to be considered by them in determining whether defendant was negligent or not. It seems to us that this particular instruction was intended to show simply that the city authorities alone could determine whether the cars should be permitted to be left on the street for the convenience of defendant. It is true that the right to so use the street must come from the city, and in so saying to the jury the court did not weaken the force of the other instructions as to the care defendant should exercise in so occupying the street.

Instruction 11 was as follows: "If the jury believe from the evidence that any element of danger connected with the defendant's trailer by which plaintiff was injured was not a ~~see~~ hidden or concealed danger, but was open to the observation and could be comprehended by a boy of average intelligence, of the age of plaintiff, and if you further believe that the trailer, when left on the track by defendant's employes the day of the accident, was held by brakes of the ordinary kind, and that the brakes were set in a manner to hold the cars where they were unless someone should loosen the brakes, the plaintiff cannot recover."

The jury had been told "that the fact, as shown by the evidence, that the brakes of the car in question were set when the cars were left on the track in the way in which such brakes were usually set or fastened, or according to the usual custom of defendant, is a matter to be considered by the jury in passing upon the question as to whether the defendant exercised ordinary care in the way it placed and maintained said cars at the place in question; . . . and they should consider the danger, if any there was, attending the leaving of the cars at the place in question, whether said cars were of a dangerous nature likely to cause an injury of the kind complained of, and were likely to attract children thereon for amusement and play, the manner in which they were fastened, the publicity of the place, whether defendant, in the exercise of reasonable care and diligence,

should have securely fastened them, or, if that was impracticable, whether, in the exercise of such diligence, it was its duty to leave them in charge of an attendant," etc. It is claimed that these instructions are contradictory of instruction 11, *supra*, and irreconcilable with it.

If the last instruction is a correct statement of the law, as we think it is, plaintiff cannot complain even if it was inconsistent with the instructions which were manifestly more favorable to plaintiff. If the jury had given their verdict for plaintiff, the defendant might have complained. Plaintiff contends, however, that instruction 11 was not a correct statement of the law because it violates the principles laid down in the "turntable cases," which, it is claimed, apply here. The rule in these cases as held by this court will be found in *Barrett v. Southern Pac. Co.*, 91 Cal. 296, 25 Am. St. Rep. 186. In a later case (*Peters v. Bowman*, 115 Cal. 345, 56 Am. St. Rep. 106), it was said: "The rule of the turntable cases is an exception to the general ~~304~~ principle that the owner of land is under no legal duty to keep it in a safe condition for others than those whom he invites there, and that trespassers take the risk of injuries from ordinary visible causes; and it should not be carried beyond the class of cases to which it has been applied. And the cases to which the rule has been applied, so far as our attention has been called to them, are nearly all cases where the owner of land has erected on it dangerous machinery, the consequences of meddling with which are not supposed to be fully comprehended by infant minds."

The cases illustrating the principles of the turntable cases are quite fully set forth in the opinion and need not be restated.

The recent case of *Kaumerer v. City Electric Ry. Co.*, 116 Mich. 306, 72 Am. St. Rep. 525, is very similar to this one, the principal difference in its facts being that in the Michigan case the car had no brakes. It was testified by the conductor in charge of the cars in that case that when the flat-car was left at the point where the accident happened "he blocked the wheels with a stone and a stick, which could be removed by the kick of a small boy, if he hit it hard, and that he always blocked this car every time he left it." The court in its decision gave the question very careful consideration, reviewing the turntable cases from the first one—*Railroad Co. v. Stout*, 17 Wall. 657—and reached the conclusion that they do not furnish the rule by which such a case as this is to be determined. It was held upon the undisputed facts that the court should

have instructed the jury to find a verdict for the defendant. Speaking of *Railroad Co. v. Stout*, 17 Wall. 657, the court said: "It is difficult to see how that case can be likened to the present. In that case, a dangerous piece of machinery was left open, exposed, and unguarded, to the knowledge of defendant. The turntable itself was dangerous. The car in question in the present case was not dangerous in its construction. It was a plain car, with four wheels, with no machinery about it. It had no brake, but was a small platform-car. It is true that it stood upon a track where it might be moved by several children applying their united strength. Several children might in the same way move a wagon or carriage left beside the highway. We apprehend that no claim of negligence could be sustained against the owner of such a vehicle if one of the children climbing ³⁶⁵ on it should fall off and be run over, even if the wheels were left without blocking."

It is not contended that these trailer-cars were objects dangerous to children, and it has been held that cars are not "dangerous machines" within the meaning of the rule in some of the turntable cases: *Elliott on Railroads*, sec. 1260; but it is urged, as it was urged in the Michigan case, that because the cars were left in a condition which made it possible for children to loosen the brakes and push the cars along the track the cars became dangerous, and, being attractive objects to children, they were likely to move them and thus be put in danger. It will be observed that the court instructed the jury that if they believed from the evidence that the element of danger connected with these trailers was not a hidden or concealed danger, but was open to the observation, and could be comprehended by a boy of plaintiff's age with average intelligence, then in such case if defendant's cars were held by brakes of the ordinary kind, and the brakes were set in a manner to hold the cars where they were left, unless some one loosened them, the plaintiff cannot recover. We think such an instruction takes the case out of the class to which the turntable cases belong, and like cases, such as *Branson v. Labrot*, 81 Ky. 638, 50 Am. Rep. 193, where lumber was negligently piled, and analogous cases, and stated the law correctly as applicable to the undisputed facts in this case.

Appellant alleges error in submitting certain special interrogatories to the jury for answer. It is said that they were of a character calculated to lead up to a general verdict for defendant and did not embrace all the issues involved. The court was

authorized by section 625 of the Code of Civil Procedure to instruct the jury "to find upon particular questions of fact to be stated in writing" if the jury render a general verdict. It is a matter resting in the discretion of the court: *Smith v. Occidental etc. S. S. Co.*, 99 Cal. 462; and the court was not required to thus submit all the issues.

The order should be affirmed.

Cooper, C., and Britt, C., concurred.

For the reasons given in the foregoing opinion the order is affirmed. *McFarland, J., Henshaw, J., Temple, J.*

INSTRUCTIONS—HARMLESS ERROR—CONFLICTING INSTRUCTIONS—REVERSIBLE ERROR.—An erroneous charge to a jury is no ground for a reversal of judgment, where it manifestly worked no injury to the losing party: Note to *Johnson v. Giddien*, 74 Am. St. Rep. 801; *Macfarland v. Helm*, 127 Mo. 327, 48 Am. St. Rep. 629; *Mexican Cent. Ry. Co. v. Lauricella*, 87 Tex. 277, 47 Am. St. Rep. 103; and an error in a particular instruction is harmless if all the instructions, taken together, fairly present the case to the jury: *Markowitz v. Kansas City*, 125 Mo. 485, 46 Am. St. Rep. 498. But that conflicting and misleading instructions are good ground for a reversal of judgment, though the correct rule is announced in one part of the charge, see *Carson v. Stevens*, 40 Neb. 112, 42 Am. St. Rep. 661. It is reversible error to give conflicting instructions: *Bluedorn v. Missouri Pac. Ry. Co.*, 108 Mo. 439, 32 Am. St. Rep. 615.

NEGLIGENCE WHERE CHILDREN ARE INJURED.—A child of such tender years as to be incapable of exercising any judgment or discretion cannot be charged with contributory negligence, but if it has attained such an age as to be capable of exercising judgment and discretion, it is bound to use such reasonable care as one of its age and mental capacity is capable of using, and its failure to do so is negligence: *Twist v. Winona etc. R. R. Co.*, 89 Minn. 164, 12 Am. St. Rep. 626. These two points are vaguely located, and there lies between them a shadowy stretch of years, during which it is proper and necessary to submit the question to the jury, in a given case, whether or not, considering the age of the child, its capacity, intelligence, and discretion, together with the surroundings and circumstances of the case, it has been guilty of contributory negligence, forfeiting its right to recover: Note to *Studer v. Southern Pac. Co.*, 66 Am. St. Rep. 44; monographic note to *Barnes v. Shreveport etc. R. R. Co.*, 49 Am. St. Rep. 410, on negligence in dealing with children.

NEGLIGENCE—"DANGEROUS MACHINES."—RAILROAD CARS and similar machinery are not "dangerous machines," within the meaning of the rule in what are known as the "turntable cases": Note to *Barnes v. Shreveport etc. R. R. Co.*, 49 Am. St. Rep. 421. If a person, no matter what his age, is upon the track or yard of a railroad company, without inducement or invitation, express or implied, for him to enter, and he is neither a passenger nor on his way to become one, but is there merely for his amusement and using the track or yard as a playground, he is a mere intruder and trespasser, to whom the railway company owes no

duty, except the negative one not maliciously, or with gross or reckless carelessness, to run over or injure him. Hence, in case of an accident, the company is not liable for injury to one so upon its property, unless it is guilty of gross negligence: Note to Barnes v. Shreveport etc. R. R. Co., 49 Am. St. Rep. 421, treating of negligence in dealing with children. See, also, Railroad Co. v. Mackey, 53 Ohio St. 370, 53 Am. St. Rep. 641.

HIGGINS v. MANSON.

[126 California, 467.]

MORTGAGE IN EQUITY—HOW CREATED.—An agreement in writing to give a mortgage, or a mortgage defectively executed, or an imperfect attempt to create a mortgage or to appropriate specific property to the discharge of a particular debt, will create a mortgage in equity, or a specific equitable lien on the property intended to be mortgaged.

MORTGAGE IN EQUITY—IMMATERIALITY OF FORM. The form of an instrument which creates a specific equitable lien or mortgage on property is unimportant. The writing is sufficient when it clearly indicates an intention to make some particular property therein described a security for a debt.

MORTGAGE IN EQUITY—WHAT CONSTITUTES—FORECLOSURE—MAXIM OF EQUITY.—A writing appended to a note and signed by the maker, and which states that he has deposited with the payee "as security" his government patent to certain described land, together with a further statement that he agrees "to transfer and assign over" to the payee all of his "right and title" to said land, should he fail to pay his obligation, creates an equitable mortgage, enforceable by foreclosure proceedings, for it is manifest that the land should stand as security for the debt, and the land is sufficiently described to indicate what was intended to be mortgaged. It is not material that the second part of the contract is executory, because equity regards as done that which ought to be done.

George D. Collins, for the appellant.

J. N. Gillett, for the respondent.

⁴⁶⁷ **CHIPMAN C.** Foreclosure. Defendant had judgment on a general demurrer to the complaint, from which plaintiff appeals.

⁴⁶⁸ The action is brought against defendant as administratrix of her deceased husband's estate. The complaint alleges that Homer Manson in his lifetime executed and delivered to plaintiff his certain written instrument, of which the following is a copy:

"\$100.00.

San Francisco, Cal. Sept. 2d, 1896.

"One day after date (without grace), I promise to pay to the order of Charles H. Higgins the sum of one hundred and no 100 dollars for value received, with interest at the rate of one per cent per month until paid, both principal and interest payable only in United States gold coin.

"(Signed) H. MANSON."

"San Francisco, Cal., Sept. 2, 1896.

"In consideration of the sum of one hundred no 100 dollars, loaned me by Chas. H. Higgins, I this day deposit with him as security my government patent to 160 acres of timber land in Humboldt county—certificate No. 7072—dated at Washington, D. C., the 18th day of October, 1889; said certificate to be returned to me if the sum of one hundred dollars, and interest at the rate of one per cent per Mo., is paid in one year from date.

"I further agree to transfer and assign over to Chas. H. Higgins all my right and title to said 160 acres of land—certificate No. 7072—should I fail to pay my obligation of one hundred dollars and interest on September 2, 1897.

"(Signed) HOMER MANSON.

"Witness:

"(Signed) Geo. E. Dodge."

The complaint alleges that the patent referred to in the instrument was issued to Manson on October 18, 1889, by the United States, whereby title was transferred to Manson to the land sought to be sold, describing it; alleges nonpayment and waives recourse against the property of the estate other than the above-described property, and prays judgment "for the foreclosure of said lien and for the sale of said real property in satisfaction of said lien," and for general relief.

Appellant concedes that a lien cannot be created by the mere deposit of a title deed; but he contends that a lien in the nature ⁴⁶⁰ of a mortgage may be imposed upon land without compliance with section 2922 of the Civil Code: Citing Dingley v. Bank of Ventura, 57 Cal. 471; Hill v. Eldred, 49 Cal. 398; Kreling v. Kreling, 118 Cal. 419, and some other causes; also Civ. Code, secs. 1636, 1647, 1656, 2872, 2881. As to when a written memorandum makes the deposit of a title deed a mortgage he cites 1 Jones on Mortgages, sec. 187; 2 Pomeroy's Equity Jurisprudence, secs. 1235, 1237, 1266; 1 Beach's Modern Equity Jurisprudence, sec. 291. To the point that the contract

does not set forth a description of the mortgaged premises, it is claimed that reference is made to the patent and by the latter the description is furnished; that the maxim, *Id certum est quod certum reddi potest*, applies: Citing *Prebble v. Abrahams*, 88 Cal. 251, 22 Am. St. Rep. 301; *Towle v. Carmelo etc. Co.*, 99 Cal. 398.

Respondent concedes that the law of this state recognizes an equitable mortgage, and also concedes that an instrument may be drawn contemporaneous with the deposit of the title deeds which a court of equity will enforce as an equitable mortgage; but it is contended that it must be such an agreement as meets the requirements of our code, and must leave no doubt; and, further, that the instrument should "expressly state that the debt was 'secured by, or be a charge on, the land described in the deed'": Citing 3 *Pomeroy's Equity Jurisprudence*, sec. 1266; and relying especially upon *Gardner v. McClure*, 6 Minn. 250. The parties, by their mutual concessions, have reduced the inquiry to the single question as to the true purport and meaning of the written instrument pleaded. The true rule, as we think, was correctly stated in *Howard v. Iron etc. Co.*, 62 Minn. 298: "Every express agreement in writing, whereby the party clearly indicates an intention to make some particular property therein described a security for a debt, creates an equitable lien upon the property, which is enforceable. The form of the writing is not important, provided it sufficiently appears that it was thereby intended to create a security. If that intention appears, it will create a mortgage in equity, or a specific lien on the property so intended to be mortgaged": Citing, in support thereof, 2 *Pomeroy's Equity Jurisprudence*, secs. 1235, 470 1236; *Payne v. Wilson*, 74 N. Y. 348; *Daggett v. Rankin*, 31 Cal. 321; *White Water etc. Co. v. Vallette*, 21 How. 414. We are not concerned, at this time, as to the rights of third persons or creditors of the estate. If the complaint is good as between the parties to the action, it is not demurrable: *Howard v. Iron etc. Co.*, 62 Minn. 298. *Gardner v. McClure*, 6 Minn. 250, is a very well-considered and instructive case. The agreement there, however, clearly showed an intention to fix the lien upon the deed and not upon the land described therein, and the opinion in the case is mainly a learned review of the doctrine from its inception in England as applicable to the mere deposit of the deed unaccompanied by any clear intention to place a lien upon the land itself. There was in that case no such clause in the contract as the concluding paragraph of the instrument

here. In this paragraph there is, we think, a clear intention to make a transfer of the land itself by Manson, should he fail to pay as agreed. Reading the entire instrument, it seems to us the intention is made manifest that the land should stand as security for the debt, and the land is sufficiently described to indicate what was intended to be mortgaged. It is no answer that this part of the agreement was executory, for equity regards as done that which ought to be done: 2 Pomeroy's Equity Jurisprudence, sec. 1237. In *Daggett v. Rankin*, 31 Cal. 321, Mr. Justice Currey gives what Mr. Pomeroy calls "an admirable statement of this truth," namely: "The doctrine seems to be well established that an agreement in writing to give a mortgage, or a mortgage defectively executed, or an imperfect attempt to create a mortgage, or to appropriate specific property to the discharge of a particular debt, will create a mortgage in equity, or a specific (equitable) lien on the property intended to be mortgaged."

I advise that the judgment be reversed.

Gray, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the order is reversed. Temple, J., McFarland, J., Henshaw, J.

EQUITABLE MORTGAGES—CREATION OF—FORM.—An equitable mortgage arises whenever a writing shows a clear agreement to make some particular property security for the debt or obligation mentioned therein: *Dulaney v. Willis*, 95 Va. 608, 64 Am. St. Rep. 815, and note thereto showing that the form of the contract is immaterial, provided the intent to create a security appears. A mortgage defectively executed, or an imperfect attempt to create a mortgage upon specific property, for the purpose of securing a debt, will create a specific lien upon the property intended to be mortgaged: *Peers v. McLaughlin*, 88 Cal. 294, 22 Am. St. Rep. 808.

HART v. CHURCH.

[128 California, 471.]

HOMESTEAD—MORTGAGE OF—EXECUTION AND VALIDITY.—A mortgage upon a homestead is not valid unless the instrument has been jointly and concurrently executed by both husband and wife. A mortgage upon a homestead executed by a wife alone is a nullity.

HOMESTEAD—MORTGAGE OF, BY WIFE ALONE—VALIDITY.—A mortgage upon a homestead, executed by a wife alone, and recorded as her mortgage, acquires no validity from the fact

that her husband, several months afterward, indorsed upon the mortgage a statement that he joined and concurred therein as of the date when it was executed, although such statement is signed and acknowledged, and part of record.

HOMESTEAD—MORTGAGE OF, BY WIFE ALONE—PROCUREMENT BY FRAUD—VALIDITY.—A mortgage upon a homestead, executed by a wife alone, is a void instrument, regardless of the question of fraud in its procurement.

FRAUD IN OBTAINING SECURITY—CANCELLATION. As a mortgage to secure a valid note may be procured by fraud, the mortgage may be canceled, leaving the note outstanding.

LIMITATIONS OF ACTIONS—FRAUDULENT CONTRACT—ENFORCEMENT OF.—If a party who has procured a fraudulent contract, or who seeks to take advantage of it, asks to have it declared valid, or to enforce its executory terms, thus asking affirmative relief, the statute of limitations does not bar the defendant, in such a case, from objecting to the validity or to the enforcement of the contract upon the ground of fraud.

MORTGAGE AND NOTE—VALIDITY—RATIFICATION—ESTOPPEL.—As a mortgage upon a homestead executed by a wife alone is void, neither the husband nor his wife can ratify it so as to give it validity, or be estopped by conduct from asserting its invalidity. But the rule is otherwise as to a wife's note secured by the mortgage.

CONTRACTS—VALUABLE CONSIDERATION—WHAT IS. The extinguishment of, or security for, a pre-existing debt constitutes a valuable consideration for the sale or assignment of property.

FRAUDULENT CONVEYANCES—BURDEN OF PROOF—HOW SHIFTED.—If a plaintiff attacks a conveyance as in fraud of his rights, it is incumbent upon him first to show the fraudulent intent of the vendor. The burden then shifts to the purchaser to show a valuable consideration, and, this shown, the burden again shifts to the plaintiff, who must show the vendee's knowledge of the fraudulent intent of the vendor.

FRAUD IN SALE OF NOTE AND MORTGAGE—PROOF OF PURCHASER'S KNOWLEDGE—NECESSITY OF.—After proof of the fraudulent intent of the vendor of a note and mortgage, and proof by a purchaser thereof that he took the note and mortgage before maturity and paid a valuable consideration therefor, a decree declaring the note to be fraudulent and voidable, and ordering its cancellation, cannot be sustained, where the plaintiff, in an action for the rescission and cancellation of the mortgage, on the ground that it was procured by menace and fraud, failed to prove that the purchaser had knowledge of the fraud and of the fraudulent intent of the vendor in making the sale to him. But the mortgage, if void, may be canceled, regardless of the alleged fraud.

HUSBAND AND WIFE—ACTION BY WIFE.—A HUSBAND is not a necessary party to an action brought by his wife in protection of her homestead right.

John G. North, for the appellants.

Wilfred M. Peck and William J. Hunsaker, for the respondent.

⁴⁷³ HENSHAW, J. Plaintiff brought her action to procure the surrender and cancellation of a mortgage in the sum of five thousand dollars upon the homestead. She pleaded that in January, 1894, when she was the wife of Hart, the latter executed and acknowledged the declaration of homestead upon the premises in question. Thereafter, in January, 1895, her husband, for a valuable consideration, conveyed to her all his interest in the land, and ever since that day she has been the owner in fee thereof. She was induced by her husband to admit to her household the defendant Katharine A. Church. Katharine A. Church and her husband became and continued to be unduly intimate with each other. In the month of December, 1894, they entered into a conspiracy and agreement, "whereby they confederated and agreed together that they would, for their joint and mutual use and benefit, by threats, intimidation, and undue influence, compel plaintiff to execute and deliver to said defendant Katharine A. Church a mortgage upon said real estate to secure the payment to her of the sum of five thousand dollars, notwithstanding the fact that said plaintiff was not indebted to said defendant in any sum whatever." While plaintiff was in a distracted mental and feeble bodily condition, in pursuance of the conspiracy, Katharine A. Church threatened and told plaintiff that if plaintiff ⁴⁷⁸ did not at once execute the mortgage "she, said defendant, would procure the husband of plaintiff to obtain a divorce from plaintiff," and Katharine A. Church induced the husband to write plaintiff a letter, and he did write her a letter, threatening that he would procure a divorce from her if she did not immediately execute the mortgage demanded by the defendant. "By reason of the representations and threats of the defendant and the commands of her husband she was put in fear and greatly distressed, and believed, in her enfeebled mental and physical condition, that her husband would sue for a divorce and attempt to ruin her in character if she refused to execute the mortgage," and under such fears she executed it upon the seventh day of March, 1895. Upon the first day of August following, Roswell Hart, her husband, executed the following written instrument upon the same paper which contained the mortgage: "I, Roswell Hart, husband of Eleanor Hart, for a valuable consideration, hereby join and concur in the foregoing mortgage as of the sixth day of March, 1895." This was signed and acknowledged by Hart, and the mortgage, together with Hart's declaration as above given, was recorded on the second

day of August, 1895. This action was commenced by plaintiff upon March 20, 1896. In excuse for her delay in seeking to enforce a cancellation, she pleaded that from the seventh day of March, 1895, the time of the execution of the mortgage, to the twenty-eighth day of April, 1895, she was ill and unable to attend to business; that on May 1, 1895, she commenced a suit for divorce against her husband charging him with adultery with the defendant Katharine Church; "that her said husband, acting for himself and said Katharine A. Church, and for the purpose of inducing the said plaintiff to dismiss her suit for divorce against him, and to refrain from bringing an action against said defendant to procure the cancellation of said mortgage, promised plaintiff to procure from said defendant a satisfaction of said mortgage, and said Roswell Hart, from time to time thereafter until about March 1, 1896, renewed said promise to procure such satisfaction, and plaintiff, relying upon the aforesaid promises of her husband to procure such satisfaction, did refrain from taking any measures to rescind the mortgage or bring an action to procure a rescission and cancellation thereof; ⁴⁷⁴ that plaintiff was not informed that said Roswell Hart could not and would not procure such satisfaction of said mortgage until about the first day of March, 1896, whereupon she employed counsel to commence this action and did commence this action on the twentieth day of March, 1896." Her prayer was that she be adjudged the owner in fee of the property; that the mortgage be declared void and canceled, and for general relief.

To this complaint defendants interposed demurrers both general and special. These being overruled, the defendant Katharine Church answered, denying the averments of the complaint, and pleading that the mortgage was freely and voluntarily given as security for a debt due her from Roswell Hart, pleading further that Roswell Hart never conveyed the mortgaged land to his wife, but that she had surreptitiously and fraudulently secured possession of a deed to this land which had never been delivered to her, and caused it to be placed upon record; that Roswell Hart thereafter began a suit against her to set aside the deed, when, on the thirteenth day of May, 1895, plaintiff executed to him her deed to an undivided one-half of the land, subject to the mortgage made to this defendant. The defendant Elton Church, who is the son of the defendant Katharine Church, answered denying the allegations of the complaint, and filed a cross-complaint, alleging that he was the

owner by purchase for a valuable consideration and without notice of the note and mortgage in question; pleaded certain acts and declarations of the plaintiff by way of ratification of her contract of mortgage; and asked that she be estopped from contesting the validity of the same, and that he be decreed the bona fide owner and holder of them. In this condition of the pleadings the cause went to trial before a jury.

It is contended by appellant that this is not an action to determine the validity of an adverse claim under section 738 of the Code of Civil Procedure, but is an action under section 3412 of the Civil Code, which declares that a written instrument, in respect to which there is reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged and ordered to be delivered up or canceled; and in this connection reference is had to the case of *Castro v. Barry*, 79 Cal. 445. ⁴⁷³ It is further argued that the sole ground presented for the rescission and cancellation of this contract is, that it was procured from the plaintiff by menace and fraud, and, if the complaint does not show equity, the relief prayed for will be withheld. If we could adopt appellant's view that the complaint seeks relief solely upon the ground of fraud, and that the contract of mortgage was therefore not absolutely void, but voidable merely, appellant's conclusion would be impregnable, and it would become necessary in the first instance to consider the sufficiency of the complaint as a pleading seeking such relief.

But if all the allegations respecting the fraud were eliminated from the complaint, there would still be left averments sufficient to constitute a cause of action. It would be a cause of action directed against this particular written instrument, and under it the court would be asked to decree, not that the instrument was voidable, but that because of the manner of its attempted execution it was void absolutely. These particular averments of the complaint—and as to them it may be said that they are sustained by the evidence and findings—are substantially the following: The plaintiff, the wife of Roswell Hart, executed a mortgage upon the homestead to the defendant Katharine Church for the sum of five thousand dollars. The mortgage was simply a mortgage from Eleanor Hart, mortgagor, to Katharine A. Church, mortgagee, and did not contemplate nor provide for the joining therein of plaintiff's husband. The mortgagor, at the time of the execution of the mortgage, was not indebted to the mortgagee in any sum whatever. This

mortgage, dated the sixth day of March, 1895, was acknowledged by the mortgagor upon the seventh day of March following, and was filed for record upon the last-named day. Nearly five months thereafter—that is to say, upon the first day of August, 1895—Roswell Hart, husband of plaintiff, signed and acknowledged the following writing which had been transcribed upon the mortgage theretofore given by his wife: "I, Roswell Hart, husband of Eleanor Hart, for a valuable consideration, hereby join and concur in the foregoing mortgage as of the sixth day of March, 1895," and upon August 2, 1895, the mortgage was again filed for record in the recorder's office.

Under these allegations, the question arises whether or not a ⁴⁷⁶ mortgage so executed upon the homestead property creates any lien thereon, and, if not, the judgment annulling it must be upheld regardless of any consideration of the alleged fraud.

"The homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both the husband and wife": Civ. Code, sec. 1242. The provisions of the earlier homestead act of 1860, as amended in 1862, were somewhat different in their phraseology, but in effect they were the same as those now set forth in the code: *Gleason v. Spray*, 81 Cal. 217, 15 Am. St. Rep. 47. As early as *Poole v. Gerard*, 6 Cal. 71, 65 Am. Dec. 481, it was said by this court: "To make a valid sale of the homestead requires the joint deed of husband and wife." In *Barber v. Babel*, 36 Cal. 11, the homestead act received elaborate consideration from this court, and Chief Justice Sawyer in delivering its opinion, not once, but repeatedly, enunciated an interpretation of the statute to the effect that the interest in the land to the extent of the homestead value cannot, after the declaration and while both spouses are alive, "be severed, alienated, encumbered, de-vested, destroyed, or impaired without the concurrent act of both parties in the mode prescribed by the act." In *Gagliardo v. Dumont*, 54 Cal. 496, still considering the statute of 1860, it is said: "Under the restraints imposed by the homestead law, neither the husband nor the wife had power to transfer the homestead by a separate conveyance nor could either encumber it to the prejudice of the other, or of both, or to the destruction of the homestead itself. . . . Neither could, without the consent and concurrence of the other, alienate or transfer it. It was created as a place of residence for the family, and it is the policy of the law to preserve it intact for that purpose until

both the husband and wife shall mutually resolve to destroy it by alienation or abandonment. In pursuance of that policy, its destruction is prohibited except by the joint act of both in the mode provided by the homestead law." The case of *Burkett v. Burkett*, 78 Cal. 310, 12 Am. St. Rep. 58, arose when the homestead statute had been superseded by the code provision, and in discussing the code provision it is said: "The object of the statute, as construed by this court, is to prevent the destruction ⁴⁷⁷ of the homestead, except by the consent of the parties expressed by a joint conveyance."

We have been at pains thus to quote from the decisions of this court to show that uniformly and without any conflict the statute and the code, though not using the term "jointly" or "concurrently," have been construed to mean that the homestead cannot be alienated or encumbered by separate instruments separately executed by the husband and wife, and that it can only be so alienated or encumbered by the joint and concurrent execution of the instrument by the two. Neither *Ingoldsby v. Juan*, 12 Cal. 564, nor *Dentzel v. Waldie*, 30 Cal. 138, at all militate against this declaration. In both of these cases the attempt was made to convey the wife's separate property. In both cases it was found that the assent of the husband to the execution of the deed was contemporaneous with and part of the execution of the deed of the wife.

Such being our law relative to the alienation or encumbrance of homesteads, it is apparent at once that this attempted mortgage is absolutely void. Clearly, the execution and acknowledgment by the wife alone of a mortgage upon the homestead was the merest nullity. Nor did the fact that the husband, five months thereafter, wrote upon the mortgage paper a statement that he joined and concurred therein, and signed and acknowledged this declaration, add any validity to an instrument which at the time when it was drawn, signed, acknowledged, and delivered by the wife was nothing more than her own futile and abortive attempt to encumber the homestead. The husband's declaration, five months after, that he joined in this separate mortgage of his wife as of the date when it was executed, did not make the mortgage an instrument jointly and concurrently executed by the parties in the following essential respect, if in no other: The law declares that the mortgage shall be executed by both parties, and, as this law has been construed, it is to be jointly and concurrently executed by both parties in one instrument. An essential part of execution is delivery.

It must be concurrently delivered by both parties. It was delivered by the wife upon March 7th, and, the husband not joining therein, such a delivery was a nullity. Five months thereafter, when the husband took into his hands the mortgage ~~note~~ and indorsed upon it the words above quoted and in turn handed it back to the mortgagee, it was in no sense a joint delivery or a delivery of the wife at all.

The conclusion thus reached, that the mortgage was absolutely void for a failure to execute it in compliance with the terms of the code, justifies the judgment of the trial court, without regard to the question of its fraudulent procurement.

The complaint asked merely for the rescission and cancellation of the mortgage, and did not ask for the surrender and cancellation of the note for five thousand dollars executed by plaintiff to the defendant Katharine Church, which note was secured by the mortgage. The mortgage being but an incident to the debt, it could well be that one might procure through fraud security for a valid obligation. The result, therefore, of a decision upon the issues tendered by plaintiff would be to leave the note outstanding, while canceling the mortgage which secured it.

But the defendant, Elton Church, in addition to answering, filed a cross-complaint in which he alleged the execution by plaintiff to defendant Katharine Church of her promissory note for five thousand dollars secured by the mortgage in question; that the note was indorsed and the mortgage assigned to him before maturity; that he became the owner and holder of the note and mortgage without knowledge or notice of any of the fraudulent matters set forth by the plaintiff; and he further set forth facts which he contended amounted to a ratification of the contract by the plaintiff, and which also estopped her from contesting the validity of the instruments she had executed. This cross-complaint further asked that plaintiff's husband be made a party to the action, and this was done. A decree was sought that the note and mortgage in the hands of the cross-complainant be decreed good and valid. To this cross-complaint plaintiff made answer by denial, and affirmatively set up in avoidance of both the note and the mortgage the fraudulent matters which she had pleaded in her complaint.

Special issues upon many of these questions were submitted to the jury. Upon each and all of them they found for the plaintiff. The court adopted most of their findings and supplemented them with others of its own, and so rendered judgment.

ment. ⁴⁷⁹ It was found that both the note and mortgage were secured by fraud; that plaintiff had been guilty of no laches, nor had she acquiesced in or ratified her contract, and that the cross-complainant took with notice and knowledge of the facts.

It is insisted that the complaint itself shows a lack of equity, in that plaintiff's delay in commencing her action for cancellation is not sufficiently explained, and it is argued that the same omissions which render her complaint defective make her defense to the cross-complaint upon the ground of fraud itself insufficient. It is true, as appellant contends, that where a party seeks a rescission of a contract, he must act with promptness, and that the question as to what is or is not a prompt effort to rescind must depend in each case upon its own peculiar facts. It is also true that where a party seeks relief upon the ground of fraud or mistake the action must be commenced within three years after the discovery of the facts constituting the fraud or mistake, but a different case is presented where the party who has procured the fraudulent contract, or who seeks to take advantage of it, asks to have it declared valid or to enforce its executory terms, and is thus himself asking affirmative relief. The three years' statute of limitations does not bar the defendant in such a case from objecting to the validity or to the enforcement of the contract upon the ground of fraud. It is not incumbent upon one who has thus been defrauded to go into court and ask relief, but he may abide his time, and when enforcement is sought against him excuse himself from performance by proof of the fraud. Of course, in such a case he incurs the risk of defeat by the intervention of the rights of innocent parties.

As to the mortgage considered as security apart from the promissory note, it has already been said that, regardless of the question of fraud in its procurement, it is a void instrument for a lack of execution in the manner demanded by the code. Since to be a valid mortgage upon the homestead it must be concurrently executed and acknowledged by both spouses, where not so executed neither could separately ratify it so as to give it validity, nor be estopped by conduct from asserting its invalidity, because under no circumstances could the act or conduct of either separately be held to validate such a void instrument ⁴⁸⁰ without doing violence to the plain letter of the law, which declares that the homestead may be encumbered in but one way. A different question might be presented if the husband and wife, their minds meeting upon the matter, jointly and concur-

rently, by their conduct raised against themselves an estoppel in pais. But such is not the case here presented. As neither could be separately estopped so as to validate the mortgage, the absence of a finding upon the question of estoppel, if it be conceded that such an omission exists, is immaterial.

As to the note, however, the legal considerations are quite different. A wife defrauded or coerced into executing her promissory note may, after discovery of fraud, or when freed from duress, condone the wrong, waive her right of action, and ratify her contract, or she may by conduct estop herself from future reliance upon the fraud or duress. But, if for a valuable consideration her note shall before maturity have passed into the hands of an innocent holder, such holder takes it free from these equities and defenses. It was charged in this complaint that the defendant Elton Church took with knowledge and without consideration. Upon the trial it was shown that he became the owner of the note before its maturity. The evidence was uncontradicted and corroborated that he paid a valuable and sufficient consideration for the note and mortgage by the extinguishment of a pre-existing debt owed by his mother to himself. It is well settled in this state that the extinguishment or security of a pre-existing debt constitutes a valuable consideration for the sale or assignment of property: *Frey v. Clifford*, 44 Cal. 335. Elton Church, having shown that he took the note and mortgage before maturity, and that he paid a valuable consideration therefor, it was incumbent upon the plaintiff to prove that he had knowledge of the fraud and of the fraudulent intent of the vendor in making the sale to him. Upon this point we think plaintiff has failed. There was introduced in evidence a letter by the defendant Katharine Church to the mother of Roswell Hart, written after the transfer of the note and mortgage to her son. In this appear expressions sufficient to raise a doubt as to the honesty of the motive which actuated Mrs. Church in making the transfer, but we are unable to discern anything in the nature of evidence to show that the son took ⁴⁸¹ with knowledge of the alleged fraud which had been practiced upon the plaintiff, or of the fraudulent intent of his mother in making the transfer, if such existed. It is the well-settled rule that where a plaintiff attacks a conveyance as in fraud of his rights, it is incumbent upon him first to show the fraudulent intent of the vendor. The burden then shifts to the purchaser to show a valuable consideration, and, this shown, the burden again shifts to the plaintiff, who must show the vendee's

knowledge of the fraudulent intent of the vendor: *Ross v. Wellman*, 102 Cal. 4. As we read the evidence, there was a failure to show this knowledge upon the part of Elton Church. It follows therefrom that, while as to the mortgage the finding that he took with knowledge, even though erroneous, is without injury because the mortgage is absolutely void, as to the note this finding being unsupported, and since from the evidence introduced Elton Church stands in the position of an innocent purchaser, the decree declaring the note to be fraudulent and voidable and ordering its cancellation cannot be sustained.

Plaintiff's action being one in protection of her homestead right, her husband, Roswell Hart, was not a necessary party: Code Civ. Proc., sec. 370; *Prey v. Stanley*, 110 Cal. 423.

It is therefore ordered that the judgment of the trial court, in so far as it decrees invalid and orders the cancellation of the mortgage, be affirmed, but that it be modified by striking therefrom such portion thereof as decrees invalid and orders the cancellation of the note.

Temple, J., concurred.

HOMESTEAD.—A MORTGAGE of a homestead is not valid unless signed by both the husband and wife: *Notes to Van Sandt v. Alvis*, 50 Am. St. Rep. 28; *McGhee v. Wilson*, 56 Am. St. Rep. 76; *Seiffert etc. Lumber Co. v. Hartwell*, 58 Am. St. Rep. 418. If a wife is compelled, by her husband, through force and fear, to sign a mortgage upon the homestead, such mortgage is a nullity, although it accompanies, and is given to secure the payment of, a negotiable promissory note, which, with the mortgage, is transferred to an innocent holder before maturity: *Berry v. Berry*, 57 Kan. 691, 57 Am. St. Rep. 351. The validity of a conveyance of a homestead cannot depend on subsequent events: *Note to Alt v. Banholzer*, 12 Am. St. Rep. 684.

FRAUD IN PROCURING A CONTRACT vitiates it: *Note to Beck etc. Co. v. Houppert*, 53 Am. St. Rep. 80.

FRAUDULENT CONVEYANCES—KNOWLEDGE OF VENDEE.—A sale, though made by a vendor with fraudulent intent, will not be declared void unless the vendee had actual knowledge and notice of such intent: *State v. Mason*, 112 Mo. 374, 34 Am. St. Rep. 390.

CONTRACTS—VALUABLE CONSIDERATION—RATIFICATION—ESTOPPEL.—The cancellation of a pre-existing indebtedness is a valuable consideration for a conveyance; and the holder of a mortgage given for a precedent debt is a purchaser for value: *Hanold v. Kays*, 64 Mich. 489, 8 Am. St. Rep. 835, and note. As a general rule, void contracts cannot be ratified: See monographic note to *Henry Christian etc. Assn. v. Walton*, 59 Am. St. Rep. 644, on contracts which cannot be ratified; note to *Macfarland v. Helm*, 48 Am. St. Rep. 632. A void deed works no estoppel: *Note to Gilliam v. Bird*, 49 Am. Dec. 386.

FRAUDULENT CONVEYANCES—BURDEN OF PROOF AND SHIFTING THEREOF.—One who asserts that a conveyance is

fraudulent must prove the grantor's intent to defraud; but one claiming to be a bona fide purchaser from a fraudulent grantor has the burden to establish his claim. If the purchaser proves that he paid full value, the attacking party must then make it appear that the purchaser had knowledge of the fraud at the time of the conveyance: Note to *Butler v. Thompson*, 72 Am. St. Rep. 847.

REID v. ENGLEHART-DAVIDSON MERCANTILE CO.

[126 California, 527.]

HOMESTEAD—WHAT DECLARATION OF, MUST SHOW. The right of a claimant to select a homestead and to impress upon it an exemption from forced sale must appear upon the face of the declaration, and its omission cannot be supplied by extraneous evidence.

HOMESTEAD—DECLARATION OF, MUST SHOW THAT CLAIMANT IS THE "HEAD OF A FAMILY."—When a selection of a homestead is made by virtue of the claimant's being the "head of a family," it is necessary for the declaration to show that fact.

HOMESTEAD—DEFECTIVE DECLARATION OF—ACKNOWLEDGMENT.—A declaration of homestead signed, "R. M. Reid," but not stating that the claimant is the "head of a family," is defective in not showing that fact; and such defect is not obviated by the certificate of acknowledgment annexed to the declaration, which shows that "he" acknowledged the instrument. The acknowledgment is not a part of the declaration.

Leonard & Morris, E. R. Annable, and T. R. Archer, for the appellants.

Otis & Gregg, for the respondents.

527 **HARRISON, J.** Suit to quiet title. July 12, 1897, the respondent, R. M. Reid, filed for record with the county recorder for the county of San Bernardino a declaration of homestead upon certain real property, and on October 1, 1898, filed another declaration of homestead upon the same property.

The Englehart-Davidson Mercantile Company, one of the appellants herein, recovered a judgment in the justice's court for the township of Redlands against the said respondent, and an abstract of this judgment was filed in the office of the county **528** recorder September 28, 1898. November 2, 1898, the interest which R. M. Reid had in the above-named real property was sold by the sheriff under an execution issued upon this judgment on October 5th, and the certificate of sale issued thereon was transferred to this appellant. October 13, 1897, a judg-

ment was entered and docketed in the superior court of said county against Reid, and in favor of one Archer, for the sum of three hundred and seventy-five dollars, together with interest and costs, and was afterward assigned by Archer to the other appellants herein. November 17, 1898, Reid and wife brought the present action to quiet their title to said property. Judgment was rendered in their favor, and the present appeal is from this judgment.

The sole question involved upon the appeal is the sufficiency of the selection of homestead in July, 1897. The declaration is as follows:

"I hereby declare that I am married, and that I do now actually reside with my family on that certain land and premises situate in the city of Redlands, county of San Bernardino, state of California, bounded and described as follows, to wit [giving description]; I claim said premises as a homestead. The actual cash value of said premises I estimate to be three thousand dollars.

"Dated this 12th day of July, A. D. 1897.

"R. M. REID."

Section 1237 of the Civil Code defines the homestead to be the dwelling-house in which the claimant resides, and the land on which the same is situated, "selected as in this title provided." It is only a homestead "selected" in accordance with the requirements of the statute that is exempt from execution at forced sale. Section 1260 provides that homesteads of not exceeding five thousand dollars in value may be selected and claimed by any "head of a family," and to the extent of one thousand dollars in value by any other person. By section 1262, a homestead can be "selected" only by "a declaration of homestead," which must be executed and acknowledged in the same manner as a grant of real property is acknowledged, and filed for record; and by section 1263 this declaration of homestead "must contain," in addition to other statements, "a statement ⁵²⁹ showing that the person making it is the head of a family; or, when the declaration is made by the wife, showing that her husband has not made such declaration, and that she therefore makes the declaration for their joint benefit."

There is no statement in the above declaration that R. M. Reid is the "head of a family," nor are there any facts stated therein showing that the declaration was made by the "head of a family." Although it is stated that the claimant is mar-

ried, it does not appear whether the person who made this statement is husband or wife, and the words "I am married" could with equal propriety have been used by either husband or wife. If "R. M. Reid" be the wife, the declaration is defective in not showing that her husband had not previously made a declaration: *Booth v. Galt*, 58 Cal. 254. If that be the name of the husband, the declaration is defective in not "showing" that he is the head of a family. The name appears only in the signature to the declaration, and it cannot be assumed that it is the name of the husband, or even of a male person; nor can any argument be drawn therefrom that the person by whom it was made was the "head of a family."

The right of the claimant to select a homestead, and impress upon it an exemption from forced sale, must appear upon the face of the declaration, and its omission can no more be supplied by extraneous evidence than can an omission to state the value of the property claimed. The legislature has prescribed certain formalities and conditions which are essential to the "selection" of a homestead, and these formalities and conditions cannot be disregarded by courts. When a selection is made by virtue of the claimant being the "head of a family," that fact is as necessary to be shown in the declaration as is the fact of occupancy or of value. We are not at liberty to disregard one of these requisites any more than another. If either is wanting, the declaration is unavailing to create the exemption: See *Ashley v. Olmstead*, 54 Cal. 616.

It is urged by the respondent that this defect in the declaration is obviated by the certificate of acknowledgment which is annexed thereto. The certificate is as follows:

WSSO "State of California, }
 "County of San Bernardino. } ss.

"On this twelfth day of July, in the year one thousand eight hundred and ninety-seven, before me, Charles E. Truesdell, a notary public in and for the county of San Bernardino, state of California, personally appeared R. M. Reid, known to me to be the person whose name is subscribed to the within instrument, and he acknowledged to me that he executed the same.

"Witness my hand and seal.

"CHARLES E. TRUESDELL,
 "Notary Public, etc."

It is claimed that from the use therein of the masculine pronoun "he" it must be assumed that the declaration was made

by a male person, and that such person was the husband, and therefore the head of a family. The acknowledgment is, however, not a part of the declaration, but it is to be made after the declaration is completed, and the certificate of acknowledgment is not made by the claimant, but is only the statement of the officer before whom the acknowledgment was made. Moreover, as was said in *Berniaud v. Beecher*, 71 Cal. 42: "The use of the pronoun 'he' in the note, mortgage, and certificate of sale can have little if any greater effect than to raise a suspicion that the person referred to was a male and not a female."

The declaration of October, 1898, created no rights in the plaintiffs as against the claims of defendants, for the reason that at that date the defendants had existing liens upon the property: Civ. Code, sec. 1241, subd. 1.

The judgment is reversed.

Henshaw, J., Garoutte, J., Temple, J., and Beatty, C. J.; concurred.

McFarland, J., dissented.

HOMESTEAD.—THAT THE WRITTEN DECLARATION OF HOMESTEAD, for which the statute provides, does not of itself alone impress upon land the quality of homestead, see *Gregg v. Bostwick*, 33 Cal. 220, 91 Am. Dec. 637; and that such declaration made by a wife must contain the statements required by the statute, see *Cunha v. Hughes*, 123 Cal. 111, 68 Am. St. Rep. 27.

MACKENZIE v. HODGKIN.

[126 California, 591.]

SETOFF—CROSS-COMPLAINT—WHEN PROPER.—If commission merchants agree, in writing, to sell a crop of grapes and raisins for a vineyardist, and to make advances thereon, but such advances are in excess of the proceeds of sale, and their assignee brings suit to recover the balance, the defendant may properly file a cross-complaint against the assignors, averring that the money sued for was paid in part performance of their contract with him, and that they are liable to him for any breach of contract upon their part.

SETOFF—CROSS-COMPLAINT—NEW PARTIES.—If a complete determination of a controversy cannot be had without bringing in parties to the contract or transaction involved, and who have not been named as parties in the original action, such persons may be brought in as parties defendant to a cross-complaint.

SETOFF—CROSS-COMPLAINT—SERVICE OF HARMLESS IRREGULARITY.—AN OMISSION to serve a cross-com-
Am. St. Rep. Vol. LXXVII.—14

plaint upon the plaintiff is not a fatal irregularity, where the plaintiff has been, by the answer, apprised of every issue, and has not been otherwise prejudiced by such omission.

FACTORS—EVIDENCE AS TO PRICES.—IF COMMISSION MERCHANTS are obligated not to sell raisins below prices named by an association of raisin growers, and an action is brought involving a breach of contract on their part, the introduction in evidence of a published schedule of prices fixed by the association, whether erroneously admitted or not, is cured by evidence subsequently admitted, without objection or contradiction, that the prices shown in such publication were those fixed on a certain date by the association.

FACTORS—EVIDENCE OF HIGHEST MARKET PRICE. If raisins are to be delivered at a certain place to commission merchants, who bind themselves in writing to use their best endeavors to obtain the "highest market price" for them, the merchants may sell the raisins at that place, or elsewhere, but evidence of the market price in an action involving a breach of contract on their part, is not confined to the place where the raisins are actually sold. The highest market price prevailing at the place of delivery may be shown, whether the merchants were or were not negligent in failing to sell at that place.

CONTRACTS IN WRITING—ALTERING BY PAROL.—AN EXECUTED ORAL AGREEMENT, which may be proved for the purpose of altering a previous written contract, must consist in the doing or the suffering of something not required to be done or suffered by the terms of the writing.

CONTRACTS IN WRITING—MODIFYING BY PAROL—ILLUSTRATION.—If a vineyardist agrees in writing that commission merchants shall sell his entire crop of raisins upon commission, he cannot, in an action involving a breach of contract upon their part, prove a subsequent oral sale to them, for a fixed price, of a quantity of a certain kind of raisins included in the written contract, where there is no proof that any payments were made upon such oral sale, or that anything was done by the vineyardist which he was not bound to do in fulfillment of the written contract.

FACTORS—RELEASE FROM CONTRACT TO SELL FOR CERTAIN PRICE.—COMMISSION MERCHANTS, under a contract obligation not to sell raisins below prices named by an association of raisin growers, without consulting the owner, are not released from their promise by evidence that the association, soon after the making of the contract, collapsed, and abandoned their agreed schedule of prices, and thereafter had no fixed prices, the members of the association then selling at what rates they pleased.

L. L. Cory, for the appellants.

H. H. Welsh and George E. Church, for the respondent.

503 THE COURT. Williams and others were partners under the firm name of Williams, Brown & Co. in the business of commission merchants at the city of Fresno, in this state. On August 31, 1893, they made a contract in writing with Hodgkin, whereby the latter agreed to pick, cure, and deliver to them at Fresno all the grapes and raisins to be produced that season

on a certain vineyard in that vicinity owned by him, said Hodgkin, and Williams, Brown & Co. on their part agreed to pack all the raisins so delivered and sell the same for Hodgkin, they to charge specified rates of compensation for their services, and to make certain advances of cash to him on delivery of the crop at their packing-house. At various times from September 29, to November 22, 1893, inclusive, Hodgkin delivered to said Williams, Brown & Co. at Fresno above four hundred and sixty thousand pounds of raisins; they made advances to him on account ^{and} thereof to an amount which proved to be greater than the proceeds of sales of the entire crop by the sum of two thousand six hundred and sixty-five dollars and seventy-five cents. They assigned their demand for such balance to Mackenzie, who was a bookkeeper in their employ, and he brought this action to recover the same from Hodgkin. The complaint is virtually a count for money loaned to Hodgkin by plaintiff's assignors. The defendant answered such complaint, and also filed a cross-complaint, not against Mackenzie, the plaintiff, but against said Williams, Brown & Co.; in both the answer and the cross-complaint he set up in various forms his transactions with Williams, Brown & Co. concerning the marketing and sale of his said crop, and alleged sundry derelictions in that behalf against them; as the result whereof he prayed in his answer that plaintiff take nothing, and in his cross-complaint for judgment against Williams, Brown & Co. for the sum of five thousand five hundred and fifty-five dollars and ninety-two cents above the amount of their advances to him. In each count of the cross-complaint—as also in the answer—it is alleged that the assignment on which plaintiff sues was made to him by his employers without consideration and merely for the purpose of qualifying him to sue on their demand; that his cause of action arose out of the contract of defendant with Williams, Brown & Co. relating to said crop of raisins, and the delivery, sale, and disposition thereof. The cross-complaint was not served on the plaintiff, nor did he answer thereto; it was, however, answered by Williams, Brown & Co. The trial was by jury and resulted in a verdict and judgment that plaintiff take nothing and that Hodgkin recover of Williams, Brown & Co. the sum of one hundred dollars.

1. Appellants argue that the court erred in allowing the cross-complaint to be filed. "Whenever the defendant seeks affirmative relief against any party, relating to or depending upon the contract or transaction upon which the action is

brought, he may, in addition to his answer, file a cross-complaint": Code Civ. Proc., sec. 442. It is said that the cross-complaint here proceeds on a cause of action independent of, and not germane to, the matters alleged in the complaint of plaintiff. This objection is clearly unfounded; ⁵⁹⁵ the plaintiff sues to recover money loaned; defendant admits that he had the money of plaintiff's assignors, but avers, in effect, that he received it as part performance of their contract with him, and that they are liable to him for failure to perform the same fully. These averments, if proved, show that the relief sought by defendant "relates to or depends upon the contract or transactions upon which the action is brought," within the meaning of that language in the statute above quoted. The further objection that Williams, Brown & Co. could not properly be made parties defendant in the cross-complaint because they were not originally parties to the action, is also untenable. A complete determination of the controversy cannot be had without bringing in parties to the contract or transaction who have not been named as parties to the action in the original complaint: *Winter v. McMillan*, 87 Cal. 256, 22 Am. St. Rep. 243; *Eureka v. Gates*, 120 Cal. 54; *Colton etc. Co. v. Raynor*, 57 Cal. 592, 593; *Chalmers v. Trent*, 11 Utah, 88, and cases cited.

It is also contended that the omission to serve the cross-complaint on Mackenzie, the plaintiff, was a fatal irregularity. It was no doubt negligent practice; said section 442 provides that the cross-complaint "must be served on the parties affected thereby." But in this instance no right of the plaintiff has been at all prejudiced by such omission, and the judgment cannot be reversed because of it. For all the matters of substance charged in the cross-complaint were pleaded affirmatively in defendant's answer, which was served on the plaintiff, so that the latter met in the prosecution of his own action every issue which would have been tendered to him had he been served also with the cross-complaint; and, further, it was proved at the trial by his own testimony and without conflict that plaintiff took by the assignment no interest beneficial to himself in the demand he sued on, and that, if he had recovered, the whole proceeds of his recovery would have been paid to Williams, Brown & Co., who made full defense against the defendant's alleged cause of action.

2. In the contract of August 31, 1893, Williams, Brown & Co. promised that they would not sell the raisins "below prices

named by the association" without consulting Hodgkin; and ~~see~~ one of the breaches alleged in the cross-complaint is that they did sell at prices less than those "named by the association" without consulting him or obtaining his consent. There was evidence at the trial that the prices so referred to in the contract were a list agreed upon by a number of raisin growers and packers at a meeting held by them on August 22, 1893, as the prices at which raisins were to be held for sale that season. In order to show the schedule so established, defendant offered in evidence printed matter purporting to be a copy thereof in a certain newspaper published at Fresno on August 23, 1893; and, in connection with the offer, Hodgkin testified that the parties to the contract had such published prices in mind when they signed the instrument of August 31st. Plaintiff and Williams, Brown & Co. objected that the newspaper report was not the best evidence, and the objection was overruled. If there was any error in this—which we do not decide—it was cured by evidence subsequently admitted without objection and without contradiction that the prices of raisins shown in the publication received in evidence were the said prices fixed by the association on August 22d.

3. By another clause of the contract Williams, Brown & Co. agreed that they would endeavor to the best of their ability to obtain the highest market price for defendant's raisins; and in one count of the cross-complaint they are charged with negligence in the performance of this covenant, whereby, it is claimed, they failed to obtain the full value of the goods. Upon the questions thus arising the defendant was permitted to introduce evidence of the market price of raisins at Fresno during the months of October and November, 1893—the period of the delivery of defendant's product to Williams, Brown & Co. Appellants contend that evidence of this nature should have been confined to the market value of the raisins at points in the eastern states where they were actually sold by Williams, Brown & Co. They rely on the decision in *Pugh v. Porter Bros. Co.*, 118 Cal. 628, to support this point. We think, however, the present case is materially different. In the case cited it appeared that the goods were delivered to the commission merchant for the purpose of shipment from the place of delivery and to be sold in a foreign market; accordingly, it was ~~not~~ held that the factor's duty was to obtain the value in the foreign market, and that evidence of the state of the market at the place where he received the goods was inadmissible. But

here it does not appear that the raisins were necessarily to be sent away from Fresno for purposes of sale; the contract was prefaced with a recital that Williams, Brown & Co. are "engaged, among other things, in the packing and selling of raisins in the city of Fresno"; they agreed that they would "endeavor to obtain the highest market price for the grade of goods sold, and in every way endeavor to realize upon all goods sold at the earliest moment and for the highest price." They further promised, as has been seen, that they would not sell "below prices named by the association" without consulting defendant; the association was a body local to this state, and not shown to have had any influence in determining prices at the east. From these provisions of the contract, and others not necessary to state, we think Williams, Brown & Co. were at liberty to sell defendant's raisins at Fresno or elsewhere; consequently, on the question whether they used reasonable diligence to obtain the best market prices it was as pertinent to show what prices prevailed at Fresno as in any other readily accessible market. Of course, this is not saying that they were negligent in not selling at Fresno; on the contrary, it may have been that the usual course of business, or other condition affecting their conduct, was such that ordinary prudence allowed or required them to ship the raisins to the east; that matter is not for decision now.

4. In the fifth count of the cross-complaint defendant alleged that he sold and delivered to Williams, Brown & Co. "eighty-six thousand eight hundred and forty-four pounds of Valencia raisins" at the price of three and one-half cents per pound, and that they yet owe him for the same a balance of twelve hundred and forty-three dollars and three cents. At the trial these allegations were strongly contested; defendant was allowed to testify that about October 1, 1893, Williams, Brown & Co., agreed with him orally to buy the said Valencia raisins at the price alleged—appellants objecting that the effect of the evidence is to vary by parol the terms of the written contract of August 31st. At the outset of his testimony defendant stated that "under the contract"—referring to the instrument ⁶⁹⁸ of August 31st—he delivered to Williams, Brown & Co. all his raisins, including the Valencias; and although, when he came to testify concerning the alleged oral agreement of October 1st, he said that the "written contract referred to ordinary raisins, the oral one to dipped raisins called Valencias," yet it is clear that the Valencia raisins were made from the grapes which were the subject of the writing; the instrument

required defendant to cure and deliver to Williams, Brown & Co., on the terms stated therein, "all grapes and raisins" grown and produced during that season on his vineyard. Defendant stated in effect that he made and delivered the Valencia raisins to Williams, Brown & Co. on their oral promise to pay three and one-half cents per pound for five carloads of them. His counsel argue that this is "an executed parol agreement," and therefore that evidence thereof is admissible to alter the previous writing: Civ. Code, sec. 1698. We do not think so; we find no evidence that Williams, Brown & Co. ever paid anything as on a purchase by them of the Valencias; and, as concerns Hodgkin, so far as appears he did nothing under the alleged oral agreement which he was not bound to do in the proper fulfillment of the written contract; there was no evidence that curing raisins by the Valencia process, and delivering the same when cured, was not the due and reasonable performance of his prior written promise to "cure and deliver" his entire crop. Obviously, the executed oral agreement, which may be proved for the purpose of altering a previous written contract, must consist in the doing or the suffering of something not required to be done or suffered by the terms of the writing: See Civ. Code, secs. 1595, 1605, 1661; Pollock on Contracts, 161, 162; Vanderbilt v. Schreyer, 91 N. Y. 401. True, the defendant here testified that he sold the Valencia raisins, but the alleged sale rests in mere spoken words, which in themselves could not be allowed to alter the writing; his acts toward the execution of any contract were only such, so far as proved, as the original agreement required him to perform. A written instrument would afford but slight protection to the parties in such cases if it could be varied in this manner; a bailment could be converted into a sale, or a sale into a bailment, according as the interests of either party, after delivery of the goods, ~~see~~ might lead him to the belief, real or feigned, that the delivery had not been pursuant to the original writing, but under a subsequent oral arrangement.

5. There was evidence that about October 1, 1893, the said association of growers and packers abandoned their agreed schedule of prices, the members selling thereafter at what rates they pleased; and appellants requested the court to charge the jury that if, before any sale of defendant's raisins by Williams, Brown & Co., the prices had been changed by the association, and the association had no fixed prices at the time of any of such sales, then Williams, Brown & Co. were "relieved from any

obligation to sell for any association prices which were fixed at the time of the entering into the contract." The instruction was rightly refused; if the association had, in the course of the season, fixed prices different from those first agreed on, it may be that such modification should have been read into the clause of the contract referred to in the instruction; but no other prices were subsequently fixed; the members of the association simply abandoned the rates first agreed on; and we think their action in that particular did not release Williams, Brown & Co. from their promise to obtain the rates which had been fixed, or, as the alternative, to consult defendant before accepting lower prices. The collapse of the association would seem to furnish a reason why defendant should have desired to be consulted regarding prices of subsequent sales, for the natural tendency of that event was to increase the degree of caution necessary to be exercised by individual sellers. There is in the record, moreover, evidence tending in some measure to show that Williams, Brown & Co. did not regard this clause of the contract as nullified by the failure of the association to maintain the agreed prices. Thus, on October 26, 1893, they wrote to Hodgkins saying that up to that time they had "had no difficulty whatsoever in getting the prices fixed by the combination"; and as late as April, 1894, they wrote to him inquiring whether they should accept a specified offer for certain of his raisins they had then in New York—an offer apparently less than the original association price.

No material error is brought to our attention except the admission of evidence touching the alleged sale of Valencia raisins ~~to~~ to Williams, Brown & Co.; but because of that the judgment is reversed and a new trial ordered.

Hearing in Bank denied.

COUNTERCLAIM—RECOUPMENT.—DAMAGES that accrue to a defendant from the transaction out of which the plaintiff's cause of action arises may be recouped: *Johnson v. White Mountain etc. Assn.*, 68 N. H. 437, 73 Am. St. Rep. 610. Such damages may be set up by way of counterclaim: See monographic note to *Woodruff v. Garner*, 89 Am. Dec. 485, on the scope and office of counterclaim under the code.

FACTORS—SALES—PLACE AND VALUE.—The presumption is that produce was intended to be sold at the place of the factor's residence. It has been held that factors may, by custom, send goods away from their place of residence for sale, but it has been questioned whether the rule requiring the sale to be made in such place can be changed by usage or custom: Note to *Comer v. Way*, 54 Am. St. Rep. 100. In determining the value of goods at a par-

ticular place, evidence of the value at other places than the place in question is inadmissible, where the evidence is clear that there is a value at that place: *Comer v. Way*, 107 Ala. 300, 54 Am. St. Rep. 93.

CONTRACTS—MODIFICATION OF BY PAROL.—After a contract has been reduced to writing the parties may, before a breach thereof, make a new and valid contract, not in writing, either annulling the former agreement altogether, or adding to, subtracting from, varying, or qualifying its terms: *Harris v. Murphy*, 119 N. O. 34, 56 Am. St. Rep. 656. See, also, the monographic note to this case on a subsequent parol agreement to vary a writing.

COUNTY OF LOS ANGELES v. SPENCER.

[126 California, 670.]

STATUTES—EMBRACING MORE THAN ONE SUBJECT—CONSTITUTIONALITY.—"An act to promote and protect the horticultural interests of the state" is not unconstitutional on the ground that it embraces more than one subject, grouped under one title, where every provision of the act points directly to the protection and promotion of such interests.

NUISANCE.—A LEGISLATURE has the power to declare that to be a nuisance which is such in fact.

STATUTES DECLARING WHAT IS A NUISANCE—EXERCISE OF JUDICIAL POWER—CONSTITUTIONALITY.—A statute designed to protect and promote the horticultural interests of the state, which declares that all places, orchards, etc., infected with the pests mentioned in the statute are public nuisances, and which act is a proper exercise of the police power, is not unconstitutional on the ground that it confers judicial powers upon the horticultural commissioners, where a commissioner, in determining whether any particular place is a nuisance, must necessarily exercise some discretion which, in a strict sense, is judicial in its nature.

LIEN FOR ABATING A NUISANCE—ENFORCEMENT OF—CONSTITUTIONALITY.—A lien given by statute upon premises for the expense of abating an insect pest nuisance thereon is not for a delinquent tax, but for an indebtedness due the county, and its enforcement in the way prescribed by the statute is not obnoxious to any constitutional inhibition.

J. A. Donnell and William P. James, for the appellant.

Tanner & Taft and Gardiner, Harris & Rodman, for the respondents.

¶ **GRAY, C.** The plaintiff appeals from a judgment following an order sustaining a demurrer to an amended complaint without leave to further amend.

The amended complaint purports to set out a cause of action to foreclose a lien for the expense of abating an insect pest

nuisance in defendant's orchard. This lien is claimed to exist by virtue of an act entitled, "An act to protect and promote the horticultural interest of the state," and acts amendatory thereof and additional thereto. The act in question may be found in the Statutes of 1881, page 88, and the amendments and additions thereto in the Statutes of 1889, page 413, and the Statutes of 1891, pages 260 and 268. In sustaining the demurrer without leave to amend, the learned judge of the court below filed an opinion, in which the principal reason assigned for the action of the court is that the act in question is unconstitutional, and this, also, is the main reason urged on this appeal in support of the judgment. It is said, first, that the act embraces more than one subject grouped under one title. The act as amended provides for the appointment, by the board of supervisors of any county in the state to whom the required petition is presented, of a horticultural commission of not exceeding three members. It also prescribes the length of the terms of office of said commissioners and the manner of filling vacancies therein. It then defines the duties and powers of the board of horticultural commissioners, fixes their compensation, and provides for their removal. It makes the expense of removing or abating an insect pest nuisance from any property infested thereby a lien upon the property or premises from which such nuisance has been abated. All the duties and powers conferred upon said board appertain to the abating of those insect pest nuisances which interfere with the business of horticulture.

From this brief summary it will be readily seen that every ⁶⁷² provision of the act points directly to the protection and promotion of the horticultural interests of the state, and hence all said provisions relate to but one subject and may be properly grouped in one act under the very appropriate title of "An act to protect and promote the horticultural interests of the state." This view seems to be supported by the following cases and the cases therein cited: *Ex parte Liddell*, 93 Cal. 633; *Abeel v. Clark*, 84 Cal. 226.

It is urged that the act in question is unconstitutional and invalid because it confers judicial powers upon the horticultural commissioners, contrary to article 3 of the state constitution; but we do not think that this contention can be maintained. This provision of the constitution must be understood as construed by judicial decisions, and with reference to the subject of police power. The act itself defines the nuisances to

which it relates and declares that "all places, orchards, nurseries," etc., infected with "scale insects, or codlin moth, or other pests injurious to fruit, plants," etc., are public nuisances. In determining whether any particular place is a nuisance, the commissioner, no doubt, exercises some discretion, which, in a strict sense, is in its nature judicial; but the executing of a police regulation quite often calls into action that kind of discretion. And yet the acts of a commissioner involved in this case are no more judicial than the acts of officers under many other laws and ordinances which have been held valid. Ordinances prohibiting the erection of wooden buildings within fire limits except upon the order of fire commissioners; giving viticultural commissioners power to prohibit the importation of diseased vines; prohibiting the carrying on of a public laundry without a certificate of the health officer and of the board of fire wardens; prohibiting retail liquor business without permission of the board of police commissioners; giving to the superintendent of public streets the power to determine where, either on a public street or on private premises, any rubbish should be deposited; forbidding orations, harangues, etc., in a park without consent of the park commissioners, or upon other grounds except by permission of the city government committee; beating drums, etc., without permission of the president of the village; prohibiting manufacturers and others from ringing bells, etc., except at such times as the board of aldermen may designate; authorizing harbor masters to station vessels and to assign each its place; forbidding the keeping of swine without a permit from the board of health; and giving to boards of health, quarantine officers, and milk inspectors discretion as to the exercise of police powers—all such laws and ordinances have been judicially held to be valid, although they confer the same power upon designated public officers as is given by the act here in question to the commissioners: *Ex parte Ah Fook*, 49 Cal. 402; *In re Flaherty*, 105 Cal. 558, and cases there cited; *Ex parte Fiske*, 72 Cal. 125; *Bittenhaus v. Johnston*, 92 Wis. 588; *Train v. Boston Disinfecting Co.*, 144 Mass. 523, 59 Am. Rep. 113; *Newton v. Joyce*, 166 Mass. 83, 55 Am. St. Rep. 385. The efficiency of many police regulations depends upon their prompt and summary execution; and therefore, from necessity, certain discretion must be given to the officers who are to make the regulations effective. In *Ex parte Ah Fook*, 72 Cal. 125, this court said: "It is obvious that

to render effectual an inquiry which has for its purpose the carrying into operation of quarantine or health laws it must be prompt and summary, and we are not aware that any reasonable provisions of the statute clothing such officers or boards with enlarged powers, often exercised by them, have ever been held unconstitutional." In the case at bar, the acts of the commissioner are not clothed with that sanctity and protection which accompanies the judicial acts of courts and judges, and the commissioner would be liable officially and personally for wrongful acts done under the color of his office. And then, again, the lien in question here could not be enforced until after a judicial investigation and determination by a court.

Beyond any question the legislature has the power to declare that to be a nuisance which is such in fact, and we think it safe to assert that everything declared to be a public nuisance in the act in question comes clearly within the meaning of that term as defined in the Civil Code, sections 3479 and 3480.

It is known that the existence of the fruit industry in the state depends upon the suppression and destruction of the pests mentioned in the statute. The act in question is, therefore, a proper exercise of the police power which the legislature has, ⁹⁷⁴ under section 1 of article 19 of the constitution, to subject private property to such reasonable restraints and burdens as will secure and maintain the general welfare and prosperity of the state: *Abeel v. Clark*, 84 Cal. 226; *Train v. Boston Disinfecting Co.*, 144 Mass. 523, 59 Am. Rep. 113. In this connection, it may be well to observe that the statute does not authorize any injury to or destruction of property, but, on the contrary, its provisions are beneficial to the very property upon which it operates.

The lien given by the statute is not for a delinquent tax, but for an indebtedness due the county, and the enforcement of it in the way prescribed by the statute is not obnoxious to any constitutional inhibition.

The case of *Boorman v. Santa Barbara*, 65 Cal. 313, and the other California cases cited by respondent to show that private property cannot be subject to burdens without due process of law are sound in principle, but as to the matter of notice the statute here under consideration is not like any of the statutes in those cases. The subject of those statutes, street improvement, does not naturally call for such prompt and immediate action as might be necessary in the abatement of a contagious nuisance like that treated of in the statute here in question: *Surocco v. Geary*, 3 Cal. 69, 58 Am. Dec. 385.

We discover no conflict with any constitutional provision in the act under consideration as finally amended in 1891.

For the foregoing reasons we advise that the judgment be reversed and the cause remanded.

Chipman, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment is reversed and the cause remanded.

McFarland, J., Temple, J., Henshaw, J.

Hearing in Bank denied.

STATUTES—SUBJECT EXPRESSED IN TITLE.—An act is not invalid because it includes details not mentioned in the title, provided the details are germane to the general subject designated in the title: *Pittsburgh etc. Ry. Co. v. Montgomery*, 152 Ind. 1, 71 Am. St. Rep. 801. A statute is not open to the objection that it contains subjects not "clearly" expressed in its title when such subjects are all "referable and cognate" to the subjects expressed in such title: *State v. Harrub*, 95 Ala. 176, 36 Am. St. Rep. 195. Compare the monographic note to *Bobel v. People*, 64 Am. St. Rep. 70, on the sufficiency of the title to a statute. If the subject of an act is properly expressed in its title, the act may create the means and instrumentalities required for its own accomplishment: *State v. Nomland*, 3 N. Dak. 427, 44 Am. St. Rep. 572.

NUISANCES.—THE LEGISLATURE HAS THE POWER TO ENLARGE the category of public nuisances by declaring places or property used to the detriment of public interests or to the injury of the health, morals, or welfare of the community, to be nuisances, although not such at common law: Notes to *Ex parte Keeler*, 55 Am. St. Rep. 799; *Murtha v. Lovewell*, 55 Am. St. Rep. 413; *Hurst v. Warner*, 47 Am. St. Rep. 545. But the legislature cannot make that a nuisance which is not such in fact: Notes to *Grand Rapids v. Powers*, 28 Am. St. Rep. 293; *Ex parte Lacey*, 49 Am. St. Rep. 96.

THE POLICE POWER OF THE STATE extends to all regulations affecting the health, good order, morals, peace and safety of society. And when such regulations do not conflict with any constitutional inhibition or natural right, their validity cannot be successfully controverted: Note to *Butler v. Chambers*, 1 Am. St. Rep. 644.

CONSTITUTIONAL LAW—JUDICIAL POWER—MINISTERIAL OFFICERS.—The mere fact that an officer is required by law to inquire into the existence of certain facts and to apply the law thereto in order to determine what his official conduct shall be, and that these acts may affect private rights, does not constitute an exercise of judicial powers, strictly speaking: *People v. Simon*, 176 Ill. 165, 68 Am. St. Rep. 175.

CASES
IN THE
SUPREME COURT
OF
COLORADO.

IN RE POPEJOY.

[28 Colorado, 32.]

HUSBAND AND WIFE—ACTION FOR SEPARATE MAINTENANCE.—Where a husband refuses to support his wife, without fault upon her part, she may maintain an action for separate maintenance, without suing for divorce.

HUSBAND AND WIFE—COMMITMENT FOR CONTEMPT—HABEAS CORPUS.—Where a husband has been committed for contempt, for his failure to pay a judgment against him for separate maintenance in favor of his wife, the question as to whether the evidence is sufficient to justify the commitment cannot be raised in habeas corpus proceedings, but must be presented by writ of error.

CONSTITUTIONAL LAW—IMPRISONMENT FOR CONTEMPT.—A constitutional provision, prohibiting imprisonment for debt, does not forbid the punishment of a contempt in refusing to obey the lawful orders or decrees of a court; hence, the imprisonment of a husband for his refusal to pay a judgment for the separate maintenance of his wife is not an imprisonment for debt.

ARREST FOR CONTEMPT—FREEDOM FROM—BAIL.—A prisoner who is out on bail, conditioned for his appearance to answer to a criminal charge, is not exempt from arrest and removal to another county by virtue of an order for commitment for contempt of court.

ARREST—AUTHORITY OF SHERIFF—WAIVER.—One who voluntarily submits himself to arrest and removal by the sheriff of another county waives his right to object that such sheriff had no authority to act outside of his own county.

HUSBAND AND WIFE—ABILITY TO PAY JUDGMENT FOR SEPARATE MAINTENANCE—HABEAS CORPUS.—Where a husband is committed for contempt of court because of his failure to pay a judgment for the separate maintenance of his wife, upon habeas corpus proceedings, where the evidence upon which the commitment is based is not before the court, it will be presumed that the court which issued the order of commitment found from the evidence that the husband had property with which to satisfy the judgment of his wife.

CONTEMPT—JURISDICTION—HABEAS CORPUS.—Where a court has jurisdiction of the person and of the subject matter of the action, an order committing for contempt will, upon habeas corpus proceedings, be conclusively presumed to be correct.

CONTEMPT.—A WARRANT COMMITTING for contempt is not required to recite that the prisoner was able to perform the act for the refusal to do which he was committed to jail.

T. C. Early, for the applicant.

W. D. Reid and J. H. Gabriel, contra.

GABBERT, J. In the original case of Annie B. Popejoy against the petitioner, the plaintiff in that action, as his wife, sought and recovered a money judgment against him for separate maintenance in the district court of Arapahoe county. Petitioner, having failed to pay this judgment, was subsequently cited to appear before the court rendering it, and show cause why he had not paid it. On the hearing had under this latter proceeding, the court directed that within a specified time he pay into its registry, for the use of plaintiff, the amount due on the original judgment, and that, on failure to do so, he be committed to the county jail of Arapahoe county until such time as he should, or until the further order of the court in the premises. Having failed to comply with this order, the court issued an attachment or warrant of commitment, directing the sheriff of Arapahoe county to arrest petitioner, and confine him in jail, in accordance with such order. This writ was served in the county of El Paso, by the sheriff of Arapahoe county. Petitioner applied to this court for a writ of habeas corpus, and in his petition sets forth the facts above mentioned, and, in addition, states that at the hearing had on the return of the citation, the evidence then taken established that he was without means to pay the judgment, and ²³ attaches to his petition what purports to be a transcript of the testimony introduced at that hearing, and avers that at the time of his arrest, under the warrant of commitment by virtue of which he is now restrained of his liberty, he was under bond to appear before a justice of the peace in El Paso county; that for this reason he protested against his arrest by the sheriff of Arapahoe county, but was forcibly seized and taken in custody by one of the duly authorized deputies of such sheriff. The writ of habeas corpus having issued, the sheriff for return sets out the proceedings had in the case of Popejoy v. Popejoy, and under these justifies his restraint

and imprisonment of the petitioner. The propositions advanced by counsel for petitioner are:

1. That the district court had no jurisdiction to try and determine the cause of Popejoy v. Popejoy; 2. That if it had jurisdiction to try and determine that cause, it exceeded it by ordering the petitioner committed to prison if he failed to pay the amount named in the order entered on the proceedings had under the citation; 3. That being under bond to appear before a justice of the peace in El Paso county, to answer a criminal charge, he could not be arrested under warrant issued by the district court of Arapahoe county; 4. The sheriff of the latter county had no authority to serve the warrant under which he is now imprisoned; and 5. This warrant is irregular and insufficient, for the reason that it does not appear therein, nor in the order under which it was issued, that he had willfully disobeyed the order of the court with regard to the payment of the money adjudged due the plaintiff in the original action, or that it was within his power to obey that order.

1. In support of the suggestion of counsel for petitioner, that the district court was without jurisdiction to enter the original judgment, he contends that an action for separate maintenance alone cannot be maintained by the wife against the husband. Conceding, but not deciding, that this question can be raised in this proceeding in the manner attempted,²⁵ it has been settled by the decisions of this court and the court of appeals that such an action may be maintained, and that the wife, in a proper case, is entitled to a judgment for separate maintenance, independent of an action for divorce: *Daniels v. Daniels*, 9 Colo. 133; *Dye v. Dye*, 9 Colo. App. 320; *Hanscom v. Hanscom*, 6 Colo. App. 97; and although the doctrine announced by the courts of this state on this subject is in conflict with decisions on the same question in some of the other states, it is fully supported by the decisions in those which have adopted the view entertained by the appellate courts in this: *Bishop on Marriage, Divorce, and Separation*, secs. 1398, 1399; *Galland v. Galland*, 38 Cal. 265; *Van Arsdalen v. Van Arsdalen*, 30 N. J. Eq. 359; *Garland v. Garland*, 50 Miss. 694; *Verner v. Verner*, 62 Miss. 260; *Almond v. Almond*, 4 Rand. 662, 15 Am. Dec. 781; *Platner v. Platner*, 66 Iowa, 378.

The broad ground upon which these authorities rest is, that it is the duty of the husband to support the wife, and if, without fault upon her part, he refuses to do so, the courts will com-

pel him to render her a reasonable support in accordance with his means, even though the wife does not seek or wish a legal separation dissolving the bonds of matrimony, and that an action for this purpose may be maintained, because of the inadequacy of ordinary legal remedies to enforce this duty: *Garland v. Garland*, 50 Miss. 694. Again, the policy of the courts is to discourage, rather than encourage, divorces. The wife may be entitled to a divorce, but whether or not she will exercise that right is optional with her, and to hold that unless she did she could not maintain an action for support would be both unreasonable and unjust, for, although the conduct of the husband may be such that she could dissolve the marriage contract, he is not relieved from his duty of supporting her because she does not wish to pursue that course, and, besides, a case might arise where the husband withheld support, but not for a sufficient length of time to entitle the wife to a divorce upon that ground, and in the interim she would be ^{so} without an adequate remedy, unless permitted to maintain an action for separate maintenance.

2. On the second proposition advanced by counsel for petitioner, it is argued that the evidence taken at the hearing, when petitioner was ordered to pay the amount then due on the judgment or stand committed to jail, was insufficient to warrant that order, and, further, that in no event, whatever the showing may have been, could petitioner be committed to jail for failure to pay this judgment. The writ of habeas corpus cannot be made to serve the purpose of a writ of error, and whether or not the evidence taken at this hearing was sufficient to justify the court in committing petitioner for contempt, if he failed to pay the judgment rendered, we are precluded from examining in this proceeding: *People v. District Court*, 22 Colo. 422. If the trial court erred in this respect, the remedy of petitioner is by a direct, and not the collateral, attack which he seeks to make by this action: *Williamson's Case*, 26 Pa. St. 9, 67 Am. Dec. 374. The real question involved in the second proposition is, whether or not the court had the power to commit petitioner for contempt in failing to pay the judgment rendered in the original case. That was an action in equity to enforce the rights of the wife, which, as we have seen, is maintainable, because of the inadequacy of an ordinary legal action to enforce the duty of the husband to render her a reasonable support, and no reason exists why a husband who has the ability and has been adjudged to pay a

specified amount for the separate maintenance of the wife, independent of any divorce proceedings, should not be punished for contempt if he fails to pay such judgment, the same as though the judgment had been rendered in a divorce proceeding, nor does the fact that such a judgment may be enforced by execution change the rule, and we therefore conclude that the district court did not exceed its jurisdiction in directing petitioner to be committed for contempt if he failed to pay the judgment which had been awarded his wife.

In this connection it is also urged by counsel for petitioner ²⁷ that under section 12, article 2, of the constitution, which prohibits imprisonment for debt, except in special cases, his imprisonment is unlawful. This constitutional provision against imprisonment for debt does not prohibit the punishment of a contempt in refusing to obey the lawful orders or decrees of a court; and in this case it appears that the petitioner is not imprisoned for a debt, but because of his refusal to obey the lawful order of the court with reference to the debt represented by the judgment in favor of his wife.

3. At the time of the arrest of petitioner under the commitment issued by the district court, he had not then been committed to any prison, nor was he in the custody of any officer or other person, upon any criminal or supposed criminal matter. On the contrary, he was out on bail, conditioned for his appearance before a justice of the peace of El Paso county, to answer to a criminal charge there pending; but that did not exempt him from arrest or removal by virtue of the commitment under which he is now held, and from which he seeks to be released, and the provisions of section 2115 of Mills' Annotated Statutes, which provide that a person, being committed to prison or in custody of an officer upon a criminal charge, shall not be removed from such prison or custody into any other prison or custody, unless it be by habeas corpus or some other legal writ, are not applicable, because, being out on bail, petitioner was not committed to prison, or in the custody of any officer.

4. The warrant under which petitioner was held by the respondent was directed to the sheriff of Arapahoe county, and was served by his deputy in the county of El Paso, and his counsel now contends that such arrest was illegal, for the reason that the authority of the sheriff of Arapahoe county did not extend into the county of El Paso. Whether or not the sheriff of Arapahoe county was lawfully authorized to arrest

petitioner in the county of El Paso is not presented for our determination. On the subject of this arrest, it appears from the averments of the petition that the only reason which petitioner urged against the authority of the sheriff of Arapahoe county ^{as} to arrest him was, that he was already under arrest on a criminal charge then pending in the county in which he was arrested; and this, it appears from the petition presented, is the only question which petitioner now presents for our consideration with reference to the authority of the sheriff to make the arrest. For the reasons above stated, he was not exempt from arrest or removal when taken in charge by the sheriff of Arapahoe county, and although that officer may not have had the authority to arrest him in El Paso county, and remove him (a question we do not determine), yet, inasmuch as the petitioner, according to the averments of his petition, appears to have voluntarily submitted to such arrest and removal, in so far as his objection was based upon the authority of the sheriff to act outside of his own county, he has waived the right to raise this question by voluntarily accompanying the sheriff to the county of Arapahoe.

5. The findings of the court, and the order in pursuance thereof, entered at the hearing had in response to the citation to petitioner to show cause, to which reference is made in the warrant of commitment, as well as in the final order under which such warrant was issued, are not before us; but in their absence we must presume that the court found from the evidence then adduced that the petitioner had property with which to satisfy the judgment of his wife; otherwise, it would not have ordered him committed for contempt for failure to pay such judgment; and, having failed to pay, his act in this respect constitutes a willful disobedience to the order of the court. Further, on this subject, it may be added that the court had jurisdiction of the person of petitioner at the time of the hearing under the citation; it had authority to order him committed if he failed to comply with its lawful orders made at that hearing; and having such jurisdiction and authority, its judgment in this respect, however erroneous, must be taken as legal and valid on this application until reversed or vacated by some appropriate proceeding: *Williamson's Case*, 26 Pa. St. 9, 67 Am. Dec. 374. Or, otherwise stated, having jurisdiction of the person of petitioner and the subject ^{as} matter of the action in which the order was made, committing him as for contempt, and not having exceeded that jurisdiction,

its judgment is conclusively presumed to be right, until regularly brought up for revision of alleged errors in its rendition. It is not necessary, as contended by counsel for the petitioner, that the warrant must itself recite that petitioner was able to perform the act for the refusal to do which he was committed to jail. Section 330 of the code, which is relied upon as authority that the warrant must so state, is not susceptible of such a construction. It only provides that when it appears that the contempt consists in the omission to perform an act which it is in the power of the person committed to perform, he may be imprisoned until he complies with the order of the court with reference to such act, and in such case the warrant shall specify the act which he is required to perform.

We find nothing in the record before us which entitles the petitioner to a discharge under the writ, and it is therefore dismissed, and he is remanded to the custody of the sheriff of Arapahoe county.

CONTEMPT—IMPRISONMENT FOR.—The constitutional prohibitions against imprisonment for debt have no application, as a rule, to the liability incurred by disobedience to an order of court; and statutes giving the power to enforce, by bodily attachment, compliance with a decree for the payment of alimony are valid: See the monographic note to *State v. Brewer*, 37 Am. St. Rep. 763, 764.

CONTEMPT—ORDER OF COMMITMENT.—An order of court directing the imprisonment of a defendant until he shall have paid a sum of money awarded as alimony pendente lite must show that he has been found able to comply with such order: *Ex parte Silvia*, 123 Cal. 293, 69 Am. St. Rep. 58.

CONTEMPT—HABEAS CORPUS.—A conviction of contempt is a separate proceeding and conclusive of every fact which might have been urged on the trial for contempt: *Williamson's Case*, 26 Pa. St. 9, 67 Am. Dec. 374; *State v. Woodfin*, 5 Ired. 199, 42 Am. Dec. 161. The functions of the writ of habeas corpus, in contempt proceedings, do not extend beyond an inquiry into the jurisdiction of the court which ordered the commitment: Extended note to *Mullin v. People*, 22 Am. St. Rep. 422. But see *Ex parte Park*, 37 Tex. Cr. Rep. 590, 66 Am. St. Rep. 835.

The Right of a Wife to Maintain a Separate Suit for Maintenance Independent of a Suit for Divorce.*

Rule of the English Courts.—Neither the ecclesiastical courts nor courts of equity in England had power to award alimony in an independent action for that purpose. The ecclesiastical courts had jurisdiction of all matters relative to divorce, and alimony was allowed as an incident to a suit for legal separation or divorce, but never, it seems, as a right independent of such an action. The only

* REFERENCE TO MONOGRAPHIC NOTES.

Alimony and its allowance: 60 Am. Dec. 665-682.
Alimony without divorce: 12 Am. Dec. 257.

manner in which English chancery courts took action in matters relating to the granting of alimony was in connection with the writ of supplicavit. This was a writ issuing out of chancery for taking sureties of the peace: Bouvier's Law Dictionary; and its purpose was to protect the wife from the personal violence of her husband. If it was necessary, in order to protect the wife, that she live apart from her husband, temporary provision was made for her support. This was, however, simply incidental to the protection given to the wife, and, as was said in *Adams v. Adams*, 100 Mass. 365, 1 Am. Rep. 111: "An attempt to use the process for the direct purpose of obtaining alimony to enable her to have a permanent separate maintenance would have been regarded as an abuse." The English rule was well summed up by Lord Loughborough in *Ball v. Montgomery*, 2 Ves. 191, as follows: "I take it to be now the established law that no court, not even the ecclesiastical court, has any original jurisdiction to give a wife separate maintenance. It is always as incidental to some other matter that she becomes entitled to a separate provision. If she applies in this court [of equity] upon a supplicavit for security of the peace against her husband, and it is necessary that she should live apart, as incidental to that the chancellor will allow her separate maintenance. So, in the ecclesiastical court, if it is necessary for a divorce a mensa et thoro propter saevitiam."

In England, during the period of the commonwealth, the ecclesiastical courts were abolished, and the judges of the chancery courts were expressly authorized to exercise jurisdiction as to alimony. This was, however, a special jurisdiction conferred upon them, they having no inherent right to exercise such powers independent of their commissions: 1 Bishop on Marriage and Divorce, sec. 1894.

Separate maintenance as an independent action, of which courts of equity take cognizance as of their own appropriate jurisdiction, is a right of purely American origin and growth.

Rule that no Independent Suit is Allowed.—In the absence of statute, the weight of judicial authority in this country supports the English rule. So far as precedent is concerned, this is certainly the logical rule, since alimony was never decreed either by the English chancery courts or the ecclesiastical courts except as incident to some other relief. The nearest approach to an independent suit in equity was the granting of the writ of supplicavit, which we have noticed, and in some cases temporary alimony was allowed. "But," said the court in *Adams v. Adams*, 100 Mass. 365, 1 Am. Rep. 111, "it never was a direct object of the writ of supplicavit to give alimony. Its purpose was to protect the complaining party from personal violence and abuse. Sometimes it was thought necessary to make a temporary provision for a wife who had left her husband because it was not safe to live with him, until he would receive her back." The security was, however,

generally taken upon the supposition that the parties would live together, and then no alimony was decreed. It is said in 2 Story on Equity, section 1423, that no modern instance of a decree for separate maintenance on supplicavit can be found. This being true, a modern court of equity has no precedent upon which it can rely to sustain the exercise of its jurisdiction over an independent suit brought solely for the purpose of recovering alimony. And the courts of equity in most of the states refuse to break away from precedent and establish a doctrine of their own. Hence, it is held that an independent suit for alimony cannot be maintained unless authorized by statute, and a court can grant alimony only as incident to a decree of divorce. And, if the allowance granted in divorce proceedings is insufficient, no other court can supply the deficiency: *Fischli v. Fischli*, 1 Blackf. 360, 12 Am. Dec. 251; *Jones v. Jones*, '18 Me. 308, 36 Am. Dec. 723; *Muckenbarg v. Holler*, 29 Ind. 139, 92 Am. Dec. 845; *Parsons v. Parsons*, 9 N. H. 309, 32 Am. Dec. 862; *Bowman v. Worthington*, 24 Ark. 522; *McGee v. McGee*, 10 Ga. 477; *Chapman v. Chapman*, 18 Ind. 396; *Anshutz v. Anshutz*, 16 N. J. Eq. 162; *Shannon v. Shannon*, 2 Gray, 285; *Atwater v. Atwater*, 53 Barb. 621; *Rees v. Waters*, 9 Watts, 90; *Harrington v. Harrington*, 10 Vt. 505.

In Louisiana, the statute specifically prescribes the cases in which a married woman can sue her husband, and a separate suit for alimony is not among the enumerated cases. Hence, such a suit can be maintained only as incident to a proceeding for divorce or a separation from bed and board. An independent suit for separate maintenance is said to be an anomaly: *Moore v. Moore*, 18 La. Ann. 613; *Carroll v. Carroll*, 42 La. Ann. 1071. The jurisdiction of courts of equity over matrimonial cases is frequently conferred and limited by statute. In such case it is reasonable to hold that the power to award alimony is controlled by the statute, and hence, unless the power is conferred by law, a court has no authority to grant alimony but as an incident to a divorce: *Doyle v. Doyle*, 26 Mo. 545.

Rule that Separate Suit may be Brought.—There is, however, abundant authority that a wife may bring a separate action to recover an allowance for her separate support and maintenance, independent of any suit for divorce. The later and better considered cases tend to support this view, and we are inclined to agree with Story that "there is so much good sense and reason in this doctrine that it might be wished it were generally adopted": Story's Equity Jurisprudence, sec. 1423a. These authorities discard English precedents as not applicable to courts of equity in this country. In a very early case in Virginia—*Purcell v. Purcell*, 4 Hen. & M. 507—it was said that the law could afford no remedy in a case like this, and that where the law afforded no remedy, a power must exist somewhere to give a remedy, and that this peculiarly belongs to a court of equity. The inadequacy of the legal remedy was said to

be universally admitted to be a sufficient ground to give a court of equity jurisdiction. And this reason has been repeatedly assigned as a sufficient one upon which to base the jurisdiction of equity in suits for separate maintenance: See *Butler v. Butler*, 4 Litt. 202; *Rhame v. Rhame*, 1 McCord Eq. 197, 16 Am. Dec. 597; *Helms v. Franciscus*, 2 Bland, 544, 20 Am. Dec. 402; *Bueter v. Bueter*, 1 S. Dak. 94; *Earle v. Earle*, 27 Neb. 277, 20 Am. St. Rep. 667; *Prather v. Prather*, 4 Desaus. Eq. 33. As was said in *Almond v. Almond*, 4 Rand. 662, 15 Am. Dec. 781: "In a civilized country, there must be some tribunal to which she may resort. She cannot be out of the protection of the law, an outcast, dependent on the charity of the world, while her husband may have thousands, and she may have brought him all. I would, in such cases, unquestionably stretch out the arm of chancery to save and protect her." In *Butler v. Butler*, 4 Litt. 202, it was argued that the fear of intruding upon the ground occupied by the ecclesiastical courts was the reason why English chancery courts had failed to exercise jurisdiction in such cases, but that a similar reason was without force in this country. In sustaining the court's jurisdiction in such cases, it was said: "It is clear that strong moral obligation must lie on every husband, who has abandoned his wife, to support her. The marriage contract and every principle binds him to do this. To fail to do it is a wrong acknowledged at common law, though the law knows no remedy, because there the wife cannot sue the husband. But in equity the wife can sue the husband, and it is the province of a court of equity to afford remedy where conscience and law acknowledges a right, but knows no remedy." In Maryland, from the earliest times, all questions concerning alimony were considered as having devolved upon the court of chancery: *Fornhill v. Murray*, 1 Bland, 479, 18 Am. Dec. 344; *Crane v. Meginnis*, 1 Gill & J. 463, 19 Am. Dec. 237. An act of the Maryland assembly of 1777 gave the chancellor power to hear and determine all causes for alimony, "in as full and ample manner as such causes could be heard and determined by the laws of England, in the ecclesiastical courts." From this act it was reasoned that chancery courts could entertain separate suits for alimony, which was illogical, of course, for the reason that ecclesiastical courts never exercised independent jurisdiction over such cases. Their position, however, was supported by limiting such suits to cases where there existed sufficient grounds for granting, in England, a divorce a mensa et thoro, with its incident alimony: *Helms v. Franciscus*, 2 Bland, 544, 20 Am. Dec. 402. The Maryland courts do not admit that equity has an original inherent jurisdiction to grant the wife a separate maintenance independent of any other consideration. There must exist a sufficient foundation for granting a divorce a mensa et thoro: *Wagoner v. Wagoner*, 77 Md. 189. Which is saying nothing more than that a separate action for alimony can be brought only under certain circumstances. This is the rule every-

where a separate suit is allowed. What these circumstances are which will justify the action will be noticed subsequently. In many of the states, a divorce from bed and board is not permitted, and where this rule prevails, it is said that to allow a separate suit for maintenance would be the same in effect as granting a divorce of this character; and that while courts acknowledge their lack of power to adjudicate the right to live in separation, yet in granting alimony they pass upon the very question of right which they admit is not within their jurisdiction: See 2 Bishop on Marriage and Divorce, sec. 356. This question and this reasoning were discussed in *Edgerton v. Edgerton*, 12 Mont. 122, 33 Am. St. Rep. 557, and it was held to furnish no sound reason for denying to equity the right to award alimony independent of a suit for divorce. To sustain its position the court cites the case of common-law courts giving judgment for necessities furnished the wife by third persons, where the husband and wife are living separate. The court calls attention to the fact that one of the facts upon which the judgment rests is that the wife has just cause for living apart from her husband during the time when the necessities were furnished. "The common-law court must try the question whether the wife was abandoned without cause, or compelled to withdraw and live separately. In other words, these conditions must be shown before judgment can be given in favor of a third party for necessities furnished her while living separately from her husband. Then, is not the judgment in such case an affirmation by the common-law court that the wife had just cause for living in separation? . . . Yet the jurisdiction of the common-law courts to give such judgments does not appear to be questioned on the ground that the same amounts to adjudging the wife justified in living apart from her husband, which, if decreed in terms, would amount to a decree of divorce a mensa et thoro. The proposition, however, is held up before the equity court as an all-sufficient 'difficulty,' whenever it is called upon to do in a more adequate, direct, simple, and just manner the very thing which the common-law court fearlessly attempts." The court reaches the conclusion that a separate suit for alimony does not amount to a divorce from bed and board any more than does an action at law by a third person for necessities furnished the wife. A different conclusion, said the court, "appears to be an extreme view, born of a zealous advocacy of one side of this disputed question of jurisdiction." To deny such jurisdiction "would seem," said the court in *Bueter v. Bueter*, 1 S. Dak. 94, "to expose the law and the courts to the just criticism of having squarely asserted the wife's right to support from her husband, yet denying her a remedy when such support is refused." In *Earle v. Earle*, 27 Neb. 277, 20 Am. St. Rep. 667, it was said that the law having made it the legal duty of a husband to support his wife and children, a court of equity has the power, in a suit by the wife for alimony and support, to enforce the discharge of such duty,

whether such action is joined with a demand for divorce or not. The court in this case, in disapproving the doctrine that a woman, who is legally entitled to support from her husband, is denied the right to sue for such support when it is denied her unless she seeks a divorce at the same time, said that "a declaration of such a doctrine as the law of the land would place it within the power of every man who, unrestrained by conscience, seeks to be freed from his obligations to his wife and family, by withholding the necessary comforts and support due them, to compel her to do that for him which the law would not do upon his own application." In *Galland v. Galland*, 88 Cal. 265, it was held that where a statute concerning divorces made provision for alimony, it was not intended to be a prohibition against the granting of alimony in other cases, and that the power to decree alimony falls within the general and inherent powers of a court of equity, and exists independent of statute. Two of the judges dissented from this opinion, holding that there was no precedent for the exercise of such powers by a court of equity, and that a wife's remedy is to provide herself with necessities which shall be charged to the husband. The husband, by compelling his wife to leave him, sends her abroad with a general credit for her maintenance. Such a method of relief, as has been pointed out in the prevailing opinion and in other cases, is at best uncertain, and may be completely worthless if she can find no tradesman who is willing to run the risk of collecting the claim from her husband: See *Bueter v. Bueter*, 1 S. Dak. 94. In *Glover v. Glover*, 16 Ala. 440, the court, in sustaining the action by the wife, makes these appropriate comments: "No one will deny but that the husband is bound by the strongest obligations, resulting not alone from the contract of marriage, but founded upon the highest moral consideration, to support his wife. And if it be true that the law, as well as enlightened conscience, creates this obligation, and no court can enforce its performance or compensate for its most cruel and flagitious violation, then indeed has one class of cases been found which falsifies the boasted maxim, 'that for every wrong there is a remedy, and for every injustice an adequate and salutary relief.'" It is undoubtedly due as much to considerations of humanity as to principles of law that courts of equity have assumed jurisdiction over cases of this character: *Murray v. Murray*, 84 Ala. 363. Even if a precedent for such relief is not to be found in the ecclesiastical courts or in English courts of chancery, the rule that a wife may sue for separate maintenance is founded upon sound principles of law and, as has been seen, has a large array of authority to support it: See, further, *Tolman v. Tolman*, 1 App. Cas. (D. C.) 299; *Shaw v. Shaw*, 2 App. Cas. (D. C.) 204; *Daniels v. Daniels*, 9 Colo. 133; *Dye v. Dye*, 9 Colo. App. 320; *Lockridge v. Lockridge*, 3 Dana, 28. 28 Am. Dec. 52; *Hulett v. Hulett*, 80 Ky. 364; *Bauer v. Bauer*, 2 N. Dak. 108; *Cochran v. Cochran*, 42 Neb. 612; *Graves v. Graves*, 50 Ohio St.

196; Farber v. Farber, 64 Iowa, 362; Platner v. Platner, 66 Iowa, 378. In Garland v. Garland, 50 Miss. 694, it was held that maintenance was a vested right in the wife, founded on the marriage contract, on the confidence reposed in the husband, and on the great advantages given the husband over the property of the wife. The wife has a right to demand the performance of this legal duty of the husband, and since her remedy, when this right is denied, is inadequate at law, equity will enforce it. If alimony could not be decreed by equity apart from divorce proceedings, the situation of married women would indeed be precarious in states like South Carolina where divorce is not recognized by the law. Fortunately, in that state equity is deemed to have original jurisdiction of such suits: Rhame v. Rhame, 1 McCord Eq. 197, 16 Am. Dec. 597.

Causes for Which Suit may be Brought.—There is some uncertainty in the cases as to what causes are sufficient to warrant a court of equity in taking jurisdiction of a suit for separate maintenance. Actual and unjustifiable desertion or abandonment of the wife by the husband is very generally recognized as a sufficient ground for alimony: Rhame v. Rhame, 1 McCord Eq. 197, 16 Am. Dec. 597; McMullen v. McMullen, 10 Iowa, 412; Glover v. Glover, 16 Ala. 440; Youngs v. Youngs, 78 Mo. App. 225; Prather v. Prather, 4 Desaus. Eq. 33. Especially where she is left destitute of the means of subsistence: Glover v. Glover, 16 Ala. 440. In Youngs v. Youngs, 78 Mo. App. 225, it was said that to constitute abandonment by the husband there must be a cessation of cohabitation, with the intention not to resume it, and the absence of the wife's consent thereto. The abandonment need not have continued for the length of time required by statute to entitle the wife to a divorce: Steele v. Steele, 96 Ky. 382. Evidence of the relations between the husband and another woman is admissible under the issue joined as to whether he had deserted her: Sweasey v. Sweasey, 126 Cal. 123. In Weir v. Weir, 10 Grant U. C. 565, it appeared that the husband resided with his children by a former wife, and compelled his wife to live at hotels, where he visited her occasionally, and the court held that she was entitled to a decree for alimony, since her right to reside with her husband was to live with him in his home or in the joint home of both, and not to be given separate quarters in a hotel. Shinn v. Shinn, 51 N. J. Eq. 78, was a somewhat similar case, where the only home the husband provided for his wife was a room in a house over which others had entire control and in which the husband and wife resided as boarders. The court granted the decree for alimony, saying that every wife was entitled to a home corresponding with the circumstances and condition of her husband, over which she shall be permitted to preside as such wife, and it is the husband's duty to furnish such home. The rule has frequently been stated generally that a wife may sue for alimony in any case where she is separated from her husband without her fault: Cochran v. Cochran, 42 Neb. 612; Will-

Iams v. Williams, 77 Ill. App. 229; *Simpson v. Simpson*, 31 Mo. 24. But where they live in the same house and eat at the same table, although they do not occupy the same room, they are not living apart in the sense that is required to allow the wife to sue for separate maintenance: *Klemme v. Klemme*, 37 Ill. App. 54. And to constitute a living separate without the wife's fault, the cases usually show either technical desertion by the husband, or cruelty which forces her to leave him. However, it does not seem to be necessary to show such desertion as will entitle the wife to a divorce. Hence, if she is living apart from him with his consent he is still bound to support her; and, if it is not shown that she has refused to return to him upon his request, she is entitled to a decree for maintenance: *Lindenschmidt v. Lindenschmidt*, 29 Mo. App. 295. But the husband has the right to choose his home, and the wife is bound to go with him if he offers to take her. If she refuses to go she has no ground of complaint: *Hair v. Hair*, 10 Rich. Eq. 163. Cruelty and improper treatment on the part of a husband, by reason of which a wife is compelled to leave her home, constitutes one of the chief grounds which induces equity to decree separate maintenance upon the wife's petition: *Almond v. Almond*, 4 Rand. 662, 15 Am. Dec. 781; *Rhame v. Rhame*, 1 McCord Eq. 197, 16 Am. Dec. 597; *Helms v. Franciscus*, 2 Bland, 544, 20 Am. Dec. 402; *Galland v. Galland*, 33 Cal. 265; *Kinsey v. Kinsey*, 37 Ala. 338; *Prather v. Prather*, 4 Desaus. Eq. 33; *Finn v. Finn*, 62 Iowa, 482; *Corley v. Corley*, 8 Baxt. 7; *Bueter v. Bueter*, 1 S. Dak. 94; *McMullen v. McMullen*, 10 Iowa, 412. As to what acts amount to cruelty which will justify a woman in leaving her husband, and which will authorize a court of equity to interfere to decree alimony, has given rise to some discussion. Actual violence, endangering life, health, or limb, is sufficient: *Rhame v. Rhame*, 1 McCord Eq. 197, 16 Am. Dec. 597; *Devall v. Devall*, 4 Desaus. Eq. 79; *Taylor v. Taylor*, 4 Desaus. Eq. 167; *Threewits v. Threewits*, 4 Desaus. Eq. 560. Words of menace, which import actual danger of bodily harm, will likewise justify the interposition of the court, since the law is not required to wait until the injury is done if the danger is sufficiently great: *Rhame v. Rhame*, 1 McCord Eq. 197, 16 Am. Dec. 597; *Hair v. Hair*, 10 Rich. Eq. 163. The tendency is to require that the cruelty must be shown sufficient to threaten the wife's personal safety, expose her to danger in person or health, or render her married life wretched or oppressive: *Finley v. Finley*, 9 Dana, 52, 33 Am. Dec. 528. In this case it was said that "an assault, or stroke, or slap, or slaps with the hand, on a single occasion or occasional petulance of temper, rudeness of language, or sallies of passion, that do not threaten bodily injury, or expose her person or health to danger, cannot be deemed sufficient to constitute cruel, inhuman and barbarous treatment." Similarly, it was held in *Rhame v. Rhame*, 1 McCord Eq. 197, 16 Am. Dec. 597, that what merely wounded the feelings, even insulting language, how-

ever galling, would not justify a court in decreeing alimony, where bodily injury was neither accomplished nor threatened. "Mere austerity of temper," it was here said, "petulance of manner, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty." To the same effect, see *Hair v. Hair*, 10 Rich. Eq. 163. In *Obrock v. Obrock*, 32 Ill. App. 149, it appeared that the husband had had seven children by his first wife, who were opposed to their stepmother, and made her position in the family intolerable, her husband upholding his children in their actions. The court held that the wife was justified in leaving and was entitled to a decree for separate maintenance. *Spengler v. Spengler*, 38 Mo. App. 266, was a similar case where a wife was compelled to leave because of torment and insult suffered from her husband's relations who lived in the family. The court decreed separate maintenance, and said that the wife was not bound to return to her husband, unless he requested her to do so, and assured her of protection from the continuance of the wrong. In *Wolcott v. Wolcott*, 114 Mich. 528, a husband made his wife indecent and criminal proposals, he was filthy in his habits, inconsiderate of her tastes and enjoyment, neglectful of her in sickness, vile in his insinuations as to her relatives and friends, of ungovernable temper, penurious, and unreasonable, and, while he did not do personal violence to her, the court very justly considered his conduct such cruelty as warranted her in leaving him and a decree for separate maintenance was entered in her behalf. In *Jelineau v. Jelineau*, 2 Desaus. Eq. 45, the husband had not absolutely beaten his wife nor forced her out of his house, but he cohabited with his own slave, insulted her and encouraged his slave to do the same, and the court granted her alimony. Where the cruelty alleged by a wife in her complaint is denied by the husband and is not established by evidence, yet if the husband consents to a decree for alimony being made against him, it will not be set aside. The court, on the grounds of public policy, will refuse to interfere: *Gracey v. Gracey*, 17 Grant U. C. 113. As already noticed, a single blow on one occasion will not usually justify the wife in leaving her husband. She is under the necessity of bearing some indignities. But the fear of further ill-treatment and the likelihood of it will be a sufficient justification, even though she has been actually struck but once. Hence, where a husband had for several years indulged in intoxicating liquors to such an extent as to have produced repeated attacks of delirium tremens, during which he became violent, and his wife had on one occasion been compelled to spend the night at a neighbor's, on the following day returning home, when she was assaulted by him with a stick, although this was the only instance in which he had ever struck her during their eighteen years of married life, the court made a decree for alimony, the wife swearing that she was apprehensive of further ill-treat-

ment if she returned to live with him: *Rodman v. Rodman*, 20 Grant U. C. 428. Unfounded charges of infidelity will constitute such cruelty as to justify the wife in leaving her husband: *Kinsey v. Kinsey*, 37 Ala. 398. Especially when such charges are accompanied by other acts of cruelty: *Finn v. Finn*, 62 Iowa, 482; *Parker v. Parker*, 57 N. J. Eq. 577. There seems to be some doubt as to whether the mere fact of adultery on the husband's part would warrant a decree for alimony. In South Carolina, where divorces are not allowed, adultery of itself is no ground for alimony: *Hair v. Hair*, 10 Rich. Eq. 163. In this case it was said that there were but three causes for which alimony would be granted, namely, cruelty, desertion, and obscene and revolting indecencies practiced in the family circles. But in *Briggs v. Briggs*, 24 S. C. 377, the court seemed to consider it a matter of some doubt as to whether adultery could be a sufficient ground for alimony. Indeed, there would seem to be no reason why a wife should not be entitled to live separate and apart from her husband if he is in the habit of committing adultery. Such conduct would justify her in leaving him, and the rule should be that where a wife is separated from her husband on account of conduct on his part justifying the separation, she is entitled to alimony. This was the rule laid down in *Graves v. Graves*, 36 Iowa, 810, 14 Am. Rep. 525, where the misconduct of the husband consisted in living in adultery with another woman, after his wife had returned to her former home, apparently on a visit. Of course, the wife must establish the fact of separation, and that it rightfully and properly exists by reason of his wrongful conduct and without fault on her part. But, as this Iowa case points out, adultery is the highest crime which a husband can commit against his wife; in fact, it is the sole ground of divorce in some states. Its existence would seem to fully justify a wife in leaving her husband, and, being separated from him because of his wrong, her right to a separate maintenance ought not to be questioned. Further, adultery was one of the causes for which ecclesiastical courts would pass a sentence of divorce a mensa et thoro, and grant alimony as a necessary and proper incident of such a sentence. The courts follow the rule of the ecclesiastical courts which allows alimony in a suit for separation from bed and board for cruelty, and there would appear to be no inconsistency in following the same courts and award alimony for adultery, where the wife has for this reason been compelled to leave her husband and is living apart from him. This was so held in *Helms v. Franciscus*, 2 Bland, 544, 20 Am. Dec. 402, where it was stated that adultery was one of the grounds upon which alimony should be awarded. In *Weigand v. Weigand*, 41 N. J. Eq. 202, it was held that a wife was not obliged to stay under her husband's roof, with his prostitute, and if she leaves his house for that reason, and he refuses to support her, she is entitled to a decree against him for alimony. This decision

was given under a statute, but the rule would appear to be the same in any event. The husband is guilty of abandonment because he has forced his wife to leave him by his own conduct. It has also been a matter of discussion as to whether it is necessary that grounds for a divorce be shown before alimony will be decreed. In *Farber v. Farber*, 64 Iowa, 362, the court declined to pass directly on the question. In *Helms v. Franciscus*, 2 Bland, 544, 20 Am. Dec. 402, it was held that a court of equity could "not allow itself to receive any matter as a sufficient ground for granting alimony alone which would not be a sufficient foundation in England for granting a divorce a mensa et thoro, together with its incident alimony." In *Hair v. Hair*, 10 Rich. Eq. 163, practically the same result was reached, with the exception that adultery was not recognized as a sufficient ground for alimony. These cases, however, arose in jurisdictions where the courts were not given authority to decree divorces, and for this reason they are not authorities to sustain the doctrine that statutory grounds for divorce should exist. In New Jersey, on the other hand, where divorces are allowed, it is held that a wife who sues for separate maintenance must show that she is living apart from her husband because of some matrimonial offense such as would entitle her to a decree of judicial separation or dissolution of the marriage bond: *Dummer v. Dummer* (N. J.), 41 Atl. Rep. 149; *Welgand v. Welgand*, 41 N. J. Eq. 202. This rule may be a safe one in jurisdictions where the grounds for divorce are ample. But the better doctrine seems to be that enunciated in *Seelye v. Seelye*, 45 Ill. App. 27, where it was said that it was not necessary that statutory grounds for divorce should exist. "It is sufficient if a persistent, unjustifiable course of conduct on the part of the husband, necessarily rendering the life of the wife miserable, be shown." And in *Wahle v. Wahle*, 71 Ill. 510, the court said that, to authorize a decree for alimony for causes other than those for which a divorce will be granted, it ought to be proved "that there was reasonable danger of personal violence to her, or a persistent, unjustifiable course of conduct, on the part of her husband, which would necessarily render her miserable, if she continued to remain with him, and that the conduct of the husband was not, in any considerable degree, induced by her fault." The same rule was recognized in *Tolman v. Tolman*, 1 App. Cas. (D. C.) 299, where it was said that the conditions may not exist to enable the wife to apply for and obtain a divorce, and yet the circumstances surrounding her may be such as to render it obviously unjust if she were denied all relief. In *Steele v. Steele*, 96 Ky. 382, relief was granted, although the abandonment of the wife had not continued for the length of time required to enable her to obtain a divorce: See, also, *Shrader v. Shrader*, 36 Fla. 502. As we shall see later, the fault of the wife is generally a defense to her action. But in *Bascom v. Bascom*, Wright, 633, alimony was decreed even though the wife was partly in fault, where there had

been much provocation, and the parties were too contentious to live together. The court very pertinently observed that it would take an extraordinary woman to pursue a mild and prudent conduct where she was frequently chastised with a cowhide. A wife cannot sue an insane husband for her separate support and maintenance. The insane husband's guardian should provide for her support out of the estate, and, if he fails to do so, the wife should apply to the court under whose authority the guardian is acting, and the court should direct the guardian to make proper provision for the wife: *Hallett v. Hallett*, 8 Ind. App. 305.

Action Allowed by Statute.—In many of the states, an independent suit for alimony has been provided by statute. This is true in Arkansas, California, Georgia, Illinois, Indiana, Kansas, Massachusetts, Michigan, New Jersey, New Hampshire, New York, North Carolina, Tennessee, Wyoming, Wisconsin, and perhaps other states. The statutes define the causes for which alimony will be decreed. In general, they are practically the same as those which have been worked out by other courts in the absence of statute, namely abandonment, and cruelty and improper treatment which forces the wife to leave her husband. The statute of Arkansas simply authorizes an action for alimony without specifying the causes for which it may be brought: *Mansfield's Digest*, sec. 2559; *Wood v. Wood*, 54 Ark. 172. The Georgia code, sections 1746, and 1747, provides, among other cases, that alimony may be granted where there is a voluntary separation between the parties: See *Gray v. Gray*, 65 Ga. 193; *Hawes v. Hawes*, 66 Ga. 142. The statutes as they have been construed quite generally require that the separation shall have been without the wife's fault. Thus in *Johnson v. Johnson*, 125 Ill. 510, it was held that in order to maintain a suit against her husband for separate maintenance, a wife must show both that she had good cause for living apart from her husband and that such living apart was without fault on her part. To the same effect is *Fowler v. Fowler*, 31 Or. 65. And while the California statute (Civ. Code, sec. 137) designates willful desertion as the sole ground for the suit, it has been held to be essential that the wife should be without fault; and that it was a sufficient defense to such an action if the husband was justified in leaving her and in living separate from her; and though he has deserted her, if her conduct after desertion has been such as to forfeit her right to be received as his wife, she cannot maintain the action: *Hardy v. Hardy*, 97 Cal. 125. Under section 1486 of the Florida Revised Statutes, it seems that a wife may bring such a suit against her husband where he is able to maintain her and yet fails to contribute to her support, though she is living with him: *Donnelly v. Donnelly*, 39 Fla. 229. Section 3318 of the General Statutes of Connecticut provides that when any person is unable to support himself or herself, and has relatives in the degree of husband, father, or mother, who are able to provide such support, the wife of such husband or any of the rela-

tives may sue the relatives able to provide for them. Under this peculiar statute, it is held that a wife whose husband neglects to support her may bring an action against him and secure an order requiring him to contribute a reasonable sum toward her maintenance: *Cunningham v. Cunningham*, 72 Conn. 157. Where a statute gives the wife a right of action for desertion, cruelty on the part of the husband which compels the wife to leave him is considered desertion by the husband: *Benton v. Benton*, 122 Cal. 395. And a husband who drives his wife from his home, merely because she will not promise not to go near her parents, is guilty of legal abandonment: *Gloster v. Gloster*, 28 N. Y. App. Div. 336. In California, a husband is, under some circumstances, privileged to sue his wife for separate maintenance. Section 176 of the California Civil Code makes it the duty of the wife to support her husband out of her separate property where he has not deserted her, "when he has no separate property, and there is no community property, and he is unable, from infirmity, to support himself." No method of enforcing this duty is provided by the code, and there was some doubt as to whether a husband could secure relief by suing his wife for separate maintenance. Section 187 of the Civil Code simply gives a wife the right to sue her husband for alimony, and in *Livingston v. Superior Court*, 117 Cal. 638, it was contended that the statute, by conferring the right to sue on the wife alone, was in effect a denial of such right to the husband. But the court, notwithstanding the provisions of this section, fell back on the inherent power, of a court of equity to decree alimony without divorce, upon the principle that "where a right exists and there is no adequate legal remedy, equity will take jurisdiction," and sustained the right of a husband to sue his wife for separate maintenance. The decision is undoubtedly sound. The statutes of the various states should be examined to ascertain under what circumstances a suit for separate maintenance may be brought independent of a divorce proceeding.

Action After Divorce.—An action for alimony cannot, as a general rule, be maintained as an independent proceeding after the parties have been divorced. The reason is that the relation of husband and wife, either de jure or de facto, is essential in order to justify an order for alimony in favor of the wife: *Wilde v. Wilde*, 36 Iowa, 319; *Blythe v. Blythe*, 25 Iowa, 266; *Bassett v. Bassett*, 99 Wis. 344, 67 Am. St. Rep. 863. After a decree of divorce has been entered, a woman is no longer the wife of her husband, and he owes her no longer any marital duty. Hence, if the divorce decree fails to award alimony, the court has no jurisdiction to make an order or supplemental decree granting alimony for the support of the wife: *Howell v. Howell*, 104 Cal. 45, 43 Am. St. Rep. 70. A decree of divorce puts an end to the relation of marriage as effectually as would the death of either party, and all duties and obligations necessarily dependent upon the continuance of that relation immediately cease, including the duty of a husband to support his wife: *Downey*

v. Downey, 98 Ala. 373. The rule holds good that alimony cannot be decreed after divorce, though the divorce was granted in another state: *Kerrigan v. Kerrigan*, 15 N. J. Eq. 146; *Fischli v. Fischli*, 1 Blackf. 360, 12 Am. Dec. 251; *Rogers v. Rogers*, 15 B. Mon. 364; *Magowan v. Magowan*, 57 N. J. Eq. 195. And this is true, although the original allowance for alimony granted in the divorce proceedings in another state was insufficient: *Fischli v. Fischli*, 1 Blackf. 360, 12 Am. Dec. 251. Circumstances may exist, however, when a wife is deemed to still retain the right to sue for separate maintenance even after a decree of divorce has been entered. Where the divorce is simply a separation from bed and board, the relation of husband and wife still exists, and the duty of the husband to support his wife, together with her right to alimony, continues. The matrimonial tie must be severed in order to put an end to the right: *State v. Ellis*, 50 La. Ann. 559. See, also, *Bowman v. Worthington*, 24 Ark. 522, 533. In *Shotwell v. Shotwell*, 1 Smedes & M. Ch. 51, the doctrine seems to be asserted that a divorced wife may always bring a bill against her husband to have alimony allotted to her. But the same court, in *Lawson v. Shotwell*, 27 Miss. 630, said that generally a wife must ask for alimony in connection with her suit for divorce, and while there may be cases when an original bill, after a decree for divorce, could be maintained for alimony, yet "a good reason must be alleged why the alimony was not at the proper time allowed. What will be a good reason must depend upon the facts of the case when presented." If the divorce was obtained on personal service against the husband, no reason exists why the wife should not have asked for alimony in the divorce proceedings, and a separate suit will not be allowed: *Weidman v. Weidman*, 57 Ohio St. 101. But if the divorce was obtained by the wife in another state, no jurisdiction being had over the person of the husband or over his property, this is deemed a sufficient reason why the wife should be permitted to bring a subsequent action against her husband for alimony alone: *Adams v. Abbott*, 21 Wash. 29. Similarly, where a divorce has been obtained in another state by the husband in an ex parte proceeding, there being no jurisdiction of the person of the wife except by constructive service, she is allowed to maintain a separate action against her divorced husband for the recovery of alimony: *Weidman v. Weidman*, 57 Ohio St. 101; *Adams v. Abbott*, 21 Wash. 29; *Cox v. Cox*, 19 Ohio St. 502, 2 Am. Rep. 415; *Van Orsdal v. Van Orsdal*, 67 Iowa, 35. Strictly speaking, the wife is no longer the wife of her husband, but as she has not had her day in court as to alimony, nor as to her interest in his property, her right to sue is construed liberally in her favor: *Weidman v. Weidman*, 57 Ohio St. 101. While the divorce in the other state is valid, so far as severing the marriage tie is concerned, yet it is not allowed to operate in the foreign jurisdiction beyond the mere dissolution of the marriage: *Cox v. Cox*, 19 Ohio St. 502, 2 Am. Rep. 415. The wife's right to alimony in such a case is lim-

ited to the property which her husband had at the time the divorce decree was entered. She was entitled to alimony, at the time the divorce was granted, out of any property which her husband may have then had. But the relation of husband and wife ceased at the time of the divorce, and neither party is entitled to any share of or interest in property which may be subsequently acquired: *Van Orsdal v. Van Orsdal*, 67 Iowa, 85. The rule seems not to prevail in New Jersey that an *ex parte* divorce by the husband in another state is no bar to a subsequent suit for alimony: *Magowan v. Magowan*, 57 N. J. Eq. 195. When, however, the adjudication for divorce has been procured by fraud, it is without extraterritorial effect, and the judgment will be treated as void in the courts of a sister state, and hence will be no bar to a separate suit for maintenance: *Magowan v. Magowan*, 57 N. J. Eq. 322, 73 Am. St. Rep. 645. A void decree of divorce necessarily constitutes no bar to a suit for maintenance. While to support such a suit the relation of husband and wife must be in force, a void decree works no change in the marital status of the parties, and can furnish no barrier to any action which the status of a wife enables her to maintain: *Shrader v. Shrader*, 38 Fla. 502; *Cochran v. Cochran*, 42 Neb. 612. In *Richardson v. Wilson*, 8 Yerg. 67, the husband had been granted a divorce by special act of the legislature, with a proviso that nothing in the act should deprive the wife of her right to alimony, if she was by law entitled to it, and the court held that the wife could sue for alimony, the legislative decree, by its terms, constituting no bar; and it was intimated that the wife's right to sue would have been the same in the absence of the saving clause in the special act.

Defenses.—The wife is not entitled to a decree for separate maintenance where she is the chief party to blame. The mere fact that the wife is living apart from the husband furnishes no ground for the action. Hence, where she leaves her husband without sufficient cause, no alimony will be awarded her: *Scott v. Scott* (Ky.), 42 S. W. Rep. 836; *Angelo v. Angelo*, 81 Ill. 251; *Porter v. Porter*, 58 Ill. App. 670; *Anonymous*, 4 Desaus. Eq. 94. Nor where she voluntarily departs: *Rhame v. Rhame*, 1 McCord Eq. 197, 16 Am. Dec. 597. Her departure must have been without her fault, and necessary for her safety or happiness, and must be consistent with social order and public policy: *Bogges v. Bogges*, 4 Dana, 308. A wife who voluntarily quits her husband's house without cause must in good faith offer to return, and be refused, before her living apart will be without her fault: *Thomas v. Thomas*, 152 Ill. 577. In this case the wife went to her mother's home, which was but two miles away. The husband was willing to receive her back, and she was willing to return if he would come after her. The court, in holding that she was not living apart from her husband without her fault, said that she had no right to stand upon a mere matter of sentiment as to the manner of getting back, she must make a direct offer

to return. The mere fact that her husband declined to escort her home was no sufficient cause for separation on her part. "The marriage relation cannot be so readily thrown off." And in *Anderson v. Anderson*, 45 Ill. App. 168, the court denied the wife any relief where she, by continuous scolding and quarreling, had materially contributed to the unhappy condition existing in her home. Adultery on the part of the wife discharges the husband from all obligation to support her, and is a good defense to a suit for separate maintenance: *Rawson v. Rawson*, 37 Ill. App. 491. The conduct of the wife, however, need not be entirely blameless before she is entitled to bring a separate suit for alimony: *Griffin v. Griffin*, 8 B. Mon. 120. And although her conduct may be somewhat turbulent, quarrelsome, and disagreeable, yet if her husband abandons her because of it, she is entitled to sue him for alimony, since her conduct does not justify his abandonment of her: *Logan v. Logan*, 2 B. Mon. 142. An offer of the husband to take his wife back and properly provide for her, if made in good faith, will be a defense to a suit for alimony: *McMullin v. McMullin*, 123 Cal. 653; *Walsh v. Walsh*, 1 Oh. Chamb. 234. It seems that the usual decree awarding alimony allows it until the husband agrees to take back his wife and treat her properly: *Rhame v. Rhame*, 1 McCord Eq. 197, 16 Am. Dec. 597. A qualified notice by a husband to his wife that she may return, accompanied by the information that he does not desire her to do so, is insufficient to defeat an action by her for separate maintenance: *Porter v. Porter*, 162 Ill. 398. A mere offer by the husband to live with his wife and support her is not necessarily a bar, since the court is not obliged to believe that the offer is sincere, and good faith in making the offer is required: *Wilson v. Wilson*, 67 Ill. App. 522. In *Taylor v. Taylor*, 4 Desaus. Eq. 165, it was said an offer to receive the wife was no defense, unless the court was satisfied that the wife might return home in safety, and would be received and treated kindly, as a wife ought to be. Requests by a husband for his wife to return which are obviously insincere are not such offers to perform his marital duties as will release him from liability for alimony: *Elliott v. Elliott*, 48 N. J. Eq. 231. In *Parker v. Parker*, 57 N. J. Eq. 577, after suit for alimony had been brought, it was held that a formal invitation by the husband to the wife to return to his house, unaccompanied by any evidence whatever of a purpose to treat her with justice and consideration, and while he yet continues to refuse even to speak to her, so that she fears to return to him, would not relieve him from the consequences of his abandonment and refusal to support her. A cold and formal proposition to give the wife mere house room and support is no defense: *Briggs v. Briggs*, 24 S. C. 377. A mere offer for the purpose of defeating the suit and to elude the justice of the court is ineffective: *Jelineau v. Jelineau*, 2 Desaus. Eq. 45. In *McMullin v. McMullin*, 123 Cal. 653, it was held that the good faith of the offer of the husband was a question of fact, and where his good faith was ascertained as a

fact, it was the duty of the wife to test his professions by acceptance, and she could not capriciously refuse to be satisfied of the good faith of his offer. If he thereafter proved derelict, her claims upon him would not be prejudiced. The willingness of a husband who has deserted his wife to provide necessities for her is no defense to an action by a wife to enforce her right to a permanent maintenance, which may be more than what is absolutely necessary. She is not compelled to rely upon his whim and temper, but is entitled to a fixed allowance, and to the means provided by statute for enforcing its payment: *Sweasey v. Sweasey*, 126 Cal. 123. An allowance furnished to the family in order to defeat the action must be such as is reasonably necessary to the station of the family and the husband's financial ability: *Youngs v. Youngs*, 78 Mo. App. 225. In *Williams v. Williams*, 77 Ill. App. 229, the husband pleaded as a defense that the cause of the separation had been condoned by his wife and that she had returned to live with him. But the court found that the cause of the original separation was a continuing one, which after the wife's return was still a menace to her health, and was therefore no bar, and said that a condonation will not be implied from the conduct of a wife who acts under the restraint of fear or the force of circumstances. The fact that a wife has neglected for a long period of time to make a demand for support and maintenance upon her husband, and that she has during this period supported herself and her children, does not estop her from maintaining an action against him, and cannot relieve him from liability in the future: *Kimble v. Kimble*, 17 Wash. 75. In this case the wife lived apart from her husband for thirty years prior to bringing suit. That a wife has property of her own is not in itself a defense to a suit for alimony. Even temporary alimony pendente lite may be allowed, though the wife has property of her own and an income therefrom: *Lumpkin v. Lumpkin*, 78 Ill. App. 324; *Harding v. Harding*, 144 Ill. 588. The law does not require a wife to exhaust her own resources first: *White v. White*, 50 Ill. App. 149. The wife's income is, however, a factor to be considered in determining the amount allowed, and, if it is ample, no reason ordinarily exists why temporary alimony should be allowed: *Harding v. Harding*, 144 Ill. 588. The wife's income from her separate property is also an important item in determining the amount of permanent alimony to be decreed: *Harding v. Harding*, 144 Ill. 588.

Allowance of Alimony.—Temporary alimony may be allowed the same as in divorce cases: *Razor v. Razor*, 149 Ill. 621; *McFarland v. McFarland*, 64 Miss. 449; *Perkins v. Perkins* (N. J.), 42 Atl. Rep. 336; *Smith v. Smith*, 51 S. C. 379. Money to defend the suit upon appeal may also be allowed the same as suit money to carry on the case at the original trial: *People v. Cook Circuit Court*, 169 Ill. 201. A court of equity has inherent power to award temporary support and suit money: *Long v. Long*, 78 Mo. App. 32. This may be done although the statute makes such provision only in case absolute di-

vorce is sought: *Milliron v. Milliron*, 9 S. Dak. 181, 62 Am. St. Rep. 863. Temporary alimony, suit money, and attorneys' fees are not always a matter of right for the wife, but they rest in the sound discretion of the court, and should depend upon its being made affirmatively to appear that the wife has a meritorious cause, is proceeding in good faith, and that it is just and equitable that the allowance should be made: *Earle v. Earle*, 60 Ill. App. 360; *Brindley v. Brindley*, 121 Ala. 429; *Harding v. Harding*, 144 Ill. 588. In Oregon, the court cannot make an allowance for the wife's counsel fees, nor for her support pendente lite: *Therkelsen v. Therkelsen*, 35 Or. 75. A denial by a husband of his wife's allegations does not prevent an allowance of temporary alimony being made: *Harding v. Harding*, 144 Ill. 588; *Milliron v. Milliron*, 9 S. Dak. 181, 62 Am. St. Rep. 863. The amount of alimony in suits for separate maintenance is arrived at in the same manner as in divorce cases: *Harding v. Harding*, 79 Ill. App. 590. An order to pay alimony must always be based upon a showing of an ability to pay: *Burghoffer v. Burghoffer*, 46 Ill. App. 396. If it appears that the husband is unable to pay anything as alimony, it may be awarded at some subsequent date upon a proper showing: *Burghoffer v. Burghoffer*, 46 Ill. App. 396. In fixing the amount of alimony, it is proper to consider all the circumstances of the case, among which are the husband's cruelty, and his circumstances and situation generally, the wife's property, social position, health and circumstances, the general family history and manner of life of the parties prior to and since their separation, and also the delictum of the husband as disclosed by the evidence: *Harding v. Harding*, 79 Ill. App. 590. The amount to be allowed is an issuable fact, and cannot be made in the first instance in excess of the amount asked for in the complaint: *Benton v. Benton*, 122 Cal. 395.

MT. ROSA MINING, MILLING, AND LAND COMPANY v. PALMER.

[26 Colorado, 56.]

APPEAL—SUFFICIENCY OF EVIDENCE TO SUPPORT FINDINGS.—Where the evidence is not preserved in a bill of exceptions, it will be presumed, on appeal, that it was sufficient to sustain the findings of the court.

MINES—RIGHTS OF LOCATOR OF CLAIM.—When a locator perfects a valid location to a lode or placer mining claim, he is entitled to the exclusive possession and enjoyment of the lands located, for all purposes granted by the act of Congress.

MINES—RIGHTS OF LOCATOR.—A PLACER LOCATION gives only a qualified possession of the ground located. It confers the exclusive right of possession of the surface area for all purposes incident to the use and operation of the same as a placer.

mining claim, and all unknown lodes or veins, but does not give the right of possession to known lodes or veins within its limits.

MINES—TITLE OF LOCATOR—ACTION TO QUIET TITLE.—The locator of a lode mining claim has an estate and interest in real property which is treated as an estate in fee as against everyone except the United States, and he may bring a suit to quiet title under a statute which permits such an action to be brought by any person in possession of real property, against any person who claims an estate therein adverse to him.

MINES—WIDTH OF LODGE CLAIM WITHIN PLACER CLAIM.—Under a statute entitling the locator of a placer mining claim, who patents a lode claim within the boundaries of his placer claim, to twenty-five feet on each side of such lode claim, and providing that if he makes no claim to such lode he has no right to its possession, the limitation of the width of a lode claim is applicable not only to the placer claimant, but applies as well to others who locate a lode within the boundaries of his previously located placer.

A. T. Gunnell, William O. Robinson, and George L. Hodges, for the appellant.

B. F. and W. F. Montgomery, Bruce Glidden, and J. H. Maupin, for the appellee.

Charles Cavender, John M. Maxwell, John A. Ewing, and Thomas, Bryant & Lee, amici curiae.

⁵⁶ GODDARD, J. This is an action instituted by the appellee, plaintiff below, against appellant, the Mt. Rosa Mining, Milling, and Land ⁵⁷ Company, defendant below, to quiet his title to two lode mining claims situate within the exterior boundaries of a certain tract of land conveyed to appellant by a government patent, as placer mining ground.

Upon the trial, it was admitted that the lode claims were formally and regularly located as provided by law, except as to the discovery of mineral therein; that affidavits in lieu of labor, for the years subsequent to their location, were properly filed by the owners; that by proper conveyances the plaintiff became, and was, the owner of whatever title had been acquired by virtue of such locations.

It was further agreed that the placer owned by the defendant was located some time prior to the location of the lode claims; that the application for a patent was not made until after their location; that the defendant, through proper conveyances, was the owner of the placer.

The only questions of fact that remained in dispute were whether or not a vein or lode was discovered and known to exist in the Handy Andy and Newman claims, within the boundaries of the Mt. Rosa placer at the time appellant ap-

plied for patent for such placer, on August 18, 1892. The court, though sitting in the exercise of its equity jurisdiction, called a jury, to which it submitted these questions. Their answers were in the affirmative, and were adopted by the court as a part of its findings; and thereupon, and from a consideration of all the evidence introduced, the court found that the facts established were substantially these: That the grantors of plaintiff, on March 18, and April 5, 1892, entered upon the land included within the exterior boundaries of the Mt. Rosa placer, and located respectively the Handy Andy and Newman lode mining claims, upon discoveries of mineral bearing rock in place, within the boundaries of said claims; and subsequently performed all acts necessary to complete a valid location of said claims; that by duly executed and recorded deeds of conveyance plaintiff became vested with all right, title, and interest in and to the same; that on November 7, 1892, the Mt. Rosa Mining, Milling, ^{ES} and Land Company made application, in the proper United States land office, for a patent for the Mt. Rosa placer mining claim; and on April 24, 1893, the patent therefor was issued; and it thereby became, and is still, seised of all the right, title, and interest to the tract of land described therein; and found, as conclusions of law, that the Handy Andy and Newman lode mining claims respectively had been duly discovered, located, and recorded, within the exterior boundaries of the tract of land described in the Mt. Rosa placer patent, before the time of said application; that the ground described in said lode mining claims was excepted out of the land described in, and conveyed by, the placer patent; that the plaintiff was, at the time of the commencement of this action, and still is, entitled to the possession of the ground described therein; and entered judgment in favor of plaintiff for the possession of the ground in dispute, and enjoining defendant from asserting any interest adverse thereto; and for costs. To reverse this judgment the company brings the case here on appeal. Error is predicated upon the refusal of the court to give certain instructions asked for by appellant, defining what constitutes a lode or vein of mineral under the statute. We think this subject was properly covered by the instructions given, and that therein the court gave the generally accepted definition, and also stated the necessary conditions that would constitute it a known lode, under the United States Revised Statutes, section 2333. The evidence not being preserved in the bill of excep-

tions, we must presume it was sufficient to sustain the answers of the jury and findings of the court, that lodes were discovered and known to exist within these respective locations prior to the application for patent. But counsel for appellant contend that, notwithstanding this, appellee cannot maintain this action, for two reasons: 1. Because appellant, having made a valid location of the ground as a placer claim, it was entitled to the exclusive possession thereof, and the entry of plaintiff's grantors thereon was wrongful, and no possessory right to the lodes was acquired thereby; 2. That if, notwithstanding such wrongful ⁵⁹ entry, valid locations of the lodes were made, the title thereby acquired is not sufficient to support an action to quiet title. It is undoubtedly true that when a locator perfects a valid location to a lode or placer mining claim, he is entitled to the exclusive possession and enjoyment of the lands located, for all purposes granted by the act of Congress. In the case of a lode location, the land located is segregated from the public mineral domain of the government, and the grant confers upon the locator the exclusive right of possession and enjoyment of the surface, and any lode the top or apex of which is within its surface boundaries: U. S. Rev. Stats., sec. 2322; and so long as he complies with the requirements of the act, he can protect his possession of the surface of his claim, as well as such lodes, from invasion, by any subsequent lode or placer locator: *Manuel v. Wulff*, 152 U. S. 505; *Armstrong v. Lower*, 6 Colo. 393; *McFeters v. Pierson*, 15 Colo. 201, 22 Am. St. Rep. 388; *Seymour v. Fisher*, 16 Colo. 188; *Belk v. Meagher*, 104 U. S. 279; *Gwillim v. Donellan*, 115 U. S. 45.

On the other hand, those provisions of the statute that give the locator of a placer the right to locate and patent all other forms of mineral deposit included within the surface boundaries of his claim, expressly excepts therefrom veins of quartz or other rock in place, known to exist within its limits: U. S. Rev. Stats., secs. 2329, 2333. Such lodes, therefore, are not the subject of a placer grant, and a placer location does not operate to confer the title, or possession thereof, upon the placer claimant, or withdraw them from subsequent location by others. In other words, the placer location gives a qualified possession of the ground located; that is to say, it confers upon the owner the exclusive right of possession of the surface area for all purposes incident to the use and operation of the same as a placer mining claim, and all unknown lodes or veins, but does not give right of possession to known lodes or

veins within its limits. The right to the possession of such lodes or veins can be acquired only by locating them as lode claims: 1 Lindley on Mines, sec. 413; *Aurora Lode v. Bulger Hill etc. Placer*, 23 Land ⁶⁰ Dec. Int. Dept. 95; *Reynolds v. Iron etc. Co.*, 116 U. S. 687.

It has been uniformly held that a patent for a placer claim does not convey title nor right of possession to the patentee to any lodes known to exist therein at the date of application; that if he desires to obtain such title and possession, he must comply with the provision of section 2333, and patent them as lode claims. In *Reynolds v. Iron etc. Co.*, 116 U. S. 687, Justice Miller, who delivered the opinion of the court, speaking upon this subject, said: "We are of opinion that Congress meant that lodes and veins known to exist when the patent was asked for should be excluded from the grant as much as if they were described in clear terms. It was not intended to remit the question of their title to be raised by some one who had or might get a better title, but to assert that no title passed by the patent in such case from the United States. It remains in the United States at the time of the issuing of the patent, and in such case it does not pass to the patentee. He takes his surface land and his placer mine, and such lodes or veins of mineral matter within it as were unknown, but to such as were known to exist he gets by that patent no right whatever."

Since a patent conveys to the placer locator no other or different rights than those acquired under the location, it inevitably follows from the doctrine thus announced that he has no possession, and acquires no right to any lodes known to exist within his claim, by virtue of his placer appropriation.

In *Aurora Lode v. Bulger Hill etc. Placer*, 23 Land Dec. Int. Dept. 95, Secretary Smith, in discussing the rights acquired by the placer locator, said: "Such a location, in and of itself, does not establish any right in the claimant under it to the superficial area within its boundaries except as a placer claim or mine. Of its own force, it cannot operate to give title to or property rights in any veins or lodes within its boundaries. True, a placer mining claim becomes property as such by discovery and location, the same as a vein or lode claim, but it cannot and ⁶¹ does not of itself in any sense give title to or property rights in veins or lodes; nor can it, in my judgment, operate to preclude a subsequent lawful discovery and location of veins or lodes within its boundaries."

And Mr. Lindley, in his admirable work on mines, after an elaborate and thorough discussion of the question, deduces the following conclusions: "1. A perfected placer location does not confer the right to the possession of veins, or lodes, which may be found to exist within the placer limits at any time prior to filing an application for a placer patent; 2. Such lodes may be appropriated (a) by the placer claimant, or (b) by others, provided the appropriation is effected by peaceable methods and in good faith."

While we recognize to its full extent the rule that precludes the initiation of a right through a trespass upon the lawful possession of another, we think, under the established facts in this case, appellant is not in a position to invoke its protection. The lodes in question were known to exist prior to the application for patent; and appellant, not having taken the necessary steps to obtain possession of them, they were open to location by others at the time they were located by the grantors of appellee. In making the locations, no right of appellant was invaded, and their validity, therefore, is in no way affected by the fact that they were made within the surface boundaries of a prior placer location.

In support of the second proposition it is urged by counsel for appellant that the mere possessory title to mining claims is not sufficient to support the action provided for in section 255 of the Civil Code. This section enacts that: "An action may be brought by any person in possession, by himself or his tenant, of real property, against any person who claims an estate therein adverse to him, for the purpose of determining such adverse claim, estate, or interest."

The estate acquired by the locator of a mining claim is an interest in real property, and although the paramount title remains in the government, the courts have universally recognized such interest as a freehold; and in all controversies ^{as} arising between the locator and other persons as to any right or claim thereto, he is treated as the owner in fee: *Merced etc. Co. v. Fremont*, 7 Cal. 317, 68 Am. Dec. 262; *Hughes v. Devlin*, 23 Cal. 502; *Merritt v. Judd*, 14 Cal. 60; *Roseville Alta etc. Co. v. Iowa Gulch etc. Co.*, 15 Colo. 29, 22 Am. St. Rep. 373; *Forbes v. Gracey*, 94 U. S. 762.

As was said in *Hughes v. Devlin*, 23 Cal. 502: "Although the ultimate title in fee in our public mineral lands is vested in the United States, yet, as between individuals, all transactions and all rights, interests, and estates in the mines are

treated as being an estate in fee, and as a distinct and vested right of property in the claimant or claimants thereof, founded upon their possession or appropriation of the land containing the mine. They are treated, as between themselves and all persons but the United States, as the owners of the land and the mines therein."

Such being the character of the locator's title, it is obvious that the foregoing provisions of the code are as applicable to mining claims as to any other real property; and his right to avail himself of the remedy therein provided is too clear to admit of dispute: *Dahl v. Raunheim*, 132 U. S. 260; *Perego v. Dodge*, 163 U. S. 160; *Noyes v. Mantle*, 127 U. S. 348; *Gillis v. Downey*, 85 Fed. Rep. 483; 29 Cir. Ct. App. 286.

Another and more serious question is presented, and that is as to the amount of surface ground appellee is entitled to, if any, under and by virtue of his lode locations. The court below awarded him the full amount claimed, to wit, three hundred by fifteen hundred feet in each of the claims. It is insisted by counsel for appellant that he is entitled to only the mineral lodes, and not to any of the surface of the placer ground.

This precise question has never, to our knowledge, been discussed or determined by a court of final resort. It has, however, been passed upon by the land department, but its rulings are not uniform. In the case of the *Shonbar Lode*, 1 Land Dec. Int. Dept. 551, 3 Land Dec. Int. Dept. 388, Secretary Teller ruled that the lode claimant having failed to adverse the placer application for patent, he was restricted to his lode and twenty-five feet of surface on each side thereof. ⁶³ Subsequently, and after the decision in the case of *Noyes v. Mantle*, 127 U. S. 348, Assistant Secretary Chandler held in the case of *Pike's Peak Lode*, 10 Land Dec. Int. Dept. 200, that the limitation of the width of a lode claim in section 2333 was only applicable where the placer claimant sought to patent the lode, and had no application to a lode claim perfected by another; that in the latter case the lode claim in its full extent should be excepted from the placer patent. It does not appear from the statement of this case whether the lode claim was located prior to the placer or not; but we infer from the fact that the secretary quoted from, and relied upon, the decision in the case of *Noyes v. Mantle*, 127 U. S. 348, as supporting this conclusion, that the lode claim was the prior location. While in the case of *Aurora Lode v. Bulger Hill etc.*

Placer, 23 Land Dec. Int. Dept. 95, Secretary Smith held that the lode location did not carry with it any more surface ground than was necessary for the use and enjoyment of the lode. But this conclusion seems to have been influenced largely, if not altogether controlled, by the peculiar conditions of that particular claim, and the fact that the placer claimant had obtained judgment in an adverse proceeding theretofore instituted against an application by the lode claimant for a patent.

The question was also involved upon the trial of the case of *Campbell v. Iron etc. Co.*, in the United States circuit court for this district, Judge Riner presiding. He entertained the view, and instructed the jury to the effect that a lode claimant, in case of a recovery, was entitled to no more than the vein or lode and fifty feet of ground, extending fifteen hundred feet in length.

We think this instruction correctly defines the amount of surface ground to which a lode located within the boundaries of a placer is entitled, under the provisions of section 2333. As was said in *Reynolds v. Iron etc. Co.*, 116 U. S. 687: "This section made provision for three distinct classes of cases: 1. When the applicant for a placer patent is at the time in possession of a vein or lode included within the boundaries of his placer claim, he shall state that fact; and on payment ^{of} the sum required for a vein claim and twenty-five feet on each side of it, at five dollars per acre, and two and a half dollars for the remainder of the placer claim, his patent shall cover both; 2. It enacted that where no such vein or lode is known to exist at the time the patent is applied for, the patent for a placer claim shall carry all valuable mineral and other deposits which may be found within the boundaries thereof; 3. But in case where the applicant for the placer is not in possession of such lode or vein within the boundaries of his claim, but such vein is known to exist, and it is not referred to or mentioned in the claim or patent, then the application shall be construed as a conclusive declaration that the claimant of the placer mine has no right to the possession of the vein or lode claim."

We think it is manifest that the lode or vein referred to in the first and third provisions is the same thing; and that whatever a placer claimant would acquire by availing himself of the privilege accorded him by the first provision of the section is reserved by virtue of the third provision; in other words, that the same extent of surface ground that is incident

to such lode or vein, if located and patented by the placer claimant, is reserved from the placer patent in case of his failure to claim and patent the same. If he elects to patent the lode, he is required to take twenty-five feet on each side of the center of the vein and pay therefor at the rate of five dollars per acre. This is a privilege accorded to him, which he may avail himself of or not, as he sees fit. If he elects to waive this privilege, he may do so in one of two ways—either by expressly excepting the lode from his placer location and application for patent, or remain silent in regard to it. If silent, then by implication he declares that he makes no claim to such lode; and by such silence is bound to the same extent, and in the same manner, but no further than he would have been by an express declaration. By electing to make no claim to a known lode, or express declaration in regard to it, he must be understood as claiming, for placer purposes, the greatest possible area within the boundaries of his placer claim, and should be held to have relinquished only that which he might ^{as} have taken, which is the lode, with the amount of surface ground provided. Why should there be any difference between the rights of claimants of known lodes within the boundaries of a placer? We know of none. The object of excepting known lodes from placer locations was to prevent titles to such lodes being obtained under the guise of a placer, at the same time, in order to protect claimants to each character of mineral locations to the greatest extent, and preserve to each that which was most valuable for particular purposes in connection with each class of claims. The lode, for convenient working, could not be limited to less than twenty-five feet on each side of the center of the vein; and the placer, which would be valueless without such surface rights, is permitted to take title to the remaining area accordingly. Those who controvert this view base their contention upon the provisions of section 2320, which it is said governs the length and width of all lode claims, whether made within the boundaries of a placer claim or not.

An act on a particular subject must be construed as a whole. Section 2320 refers to the location of lodes not conflicting with any other class of mineral locations, while by section 2333 special conditions with reference to conflicts between the two classes of mineral claims are specially provided for; and to that extent, construing the act as a whole, is a limitation or qualification of the provisions of section 2320, which

relates, as stated, to the width of lode claims generally, and regulates the width of lode claims when made upon lodes within the boundaries of a placer, whether such lodes are located by the owner of the placer, or strangers to that title. By this construction, full force and effect is given to both of these sections, and the purpose of the statute is carried out. The government receives for its mineral lands the price fixed for lodes and placers respectively, and the superior right to the surface area of the placer claimant, acquired by his prior location or patent, is protected. It is the conclusion of a majority of the court that the limitation of the width of a lode claim in section 2333 is not only applicable to the placer claimant, but applies as well to others who locate a lode within the boundaries of his previously located placer.

Chief Justice Campbell declines to express an opinion upon this question, because, in his judgment, the stipulation entered into by counsel eliminates it from the case.

It follows that the court below erred in adjudging to appellee surface ground in excess of twenty-five feet on each side of the lodes in question. For this reason the judgment is reversed, and the case remanded, with directions to enter judgment in accordance with the views we have expressed.

MINES—RIGHTS AND ESTATE OF LOCATOR.—A mining claim on the public domain is real property and the subject of complete ownership as a claim, and the locator thereof, having fully complied with the terms prescribed by Congress for acquiring title to mineral land, is the owner of the claim for all practical purposes so long as he continues such compliance. He is the owner before as well as after the issuance of the patent, and is entitled to the exclusive possession as against the whole world: *McFeters v. Pierson*, 15 Colo. 201, 22 Am. St. Rep. 388. But the estate of the locator or owner of a mining claim before a patent is issued is a conditional estate, subject to be defeated by the failure to perform the required annual work upon the claim: *Elder v. Horseshoe Min. etc. Co.*, 9 S. Dak. 636, 62 Am. St. Rep. 895.

MINES.—ON EXTRALATERAL RIGHTS, AND PATENTS for mineral claims, see the monographic notes to *Catron v. Old*, 58 Am. St. Rep. 263-280; *McClintock v. Bryden*, 63 Am. Dec. 91-110.

APPEAL.—IF A BILL OF EXCEPTIONS does not purport to set out all the evidence, the appellate court cannot reverse the finding of the trial court. It will be presumed that there was evidence sufficient to justify the finding: *Krebs Mfg. Co. v. Brown*, 106 Ala. 508, 54 Am. St. Rep. 188; *Greene v. Greene*, 49 Neb. 546, 59 Am. St. Rep. 560.

MOORE v. ALLEN.

[26 Colorado, 197.]

HUSBAND AND WIFE—ANTENUPTIAL AGREEMENT—
STATUTE OF FRAUDS.—Antenuptial agreements to convey land are included in those which, by the statute of frauds, must be in writing; but where a woman has been induced to enter into a contract of marriage by an oral promise on the part of the man to convey lands to her, which promise he fails to perform, the result is such a fraud upon her as will take the promise to convey out of the statute of frauds, and, as between them, equity will enforce the contract.

VENDOR AND PURCHASER—INNOCENT PURCHASER—
PLEADING.—A cross-complaint which seeks to avoid a conveyance on the ground that the purchaser had notice of the equitable title of the cross-complainant is insufficient as against a general demurrer, where it fails to allege that the purchase was from the fraudulent grantor or from a subsequent grantee charged with notice, because if the purchaser took title from a grantee who was an innocent purchaser, such title would be unaffected by any notice which the last purchaser might have.

DEEDS—NAMES—IDEM SONANS.—The words "Waldimar" and "Waltimore" are not idem sonans; hence a deed signed by "Waldimar Arens," by virtue of a power of attorney executed to "Waltimore Arens," is not admissible in evidence without showing that "Waltimore" and "Waldimar" was the same person.

Ejectment to recover real property situate in Leadville. Defendant, by cross-complaint, alleged a parol antenuptial agreement between herself and her husband, who, at the time it was made, was the owner of the property in dispute, whereby he agreed to convey it to her after their marriage. She was given possession of the property and made valuable improvements, but it was not conveyed to her. The plaintiff, before purchasing, was notified of her rights. A general demurrer was interposed to the cross-complaint, and a motion made to strike out part of it. Both were sustained. Trial had on the complaint and the general denial. Plaintiff introduced in evidence a power of attorney, executed to Waltimore Arens, and a deed under this power signed by Waldimar Arens. There was no evidence to show that Waltimore and Waldimar referred to the same person. This deed was necessary to establish plaintiff's title. Judgment for the plaintiff.

A. J. Sterling, for the plaintiff in error.

Nash & Bouck, and N. Rollins, for the defendant in error.

¹⁹⁹ GABBERT, J. The errors assigned will be considered in the order above named. The ultimate facts with reference to the delivery of possession of the premises to the plaintiff in error, and the erection of improvements thereon by her, were alleged, and the particular acts which she sets out regarding such possession and improvements would be competent evidence to introduce for the purpose of establishing such facts; but they do not belong in the cross-complaint. In pleadings, issues of fact are made on the material, ultimate facts, properly pleaded, and not on the evidence which it is proper to introduce and ²⁰⁰ consider in determining in whose favor such issues are established.

By the demurrer to the cross-complaint two questions are presented: 1. Do the facts pleaded with reference to the antenuptial agreement entitle plaintiff in error to the premises? 2. If so, does it appear that defendant in error had notice of such rights?

Agreements of the kind under consideration are included in those which, by the statute of frauds, must be in writing, and signed by the party to be charged therewith, otherwise they are declared void: Mills' Ann. Stats., sec. 2025; but equity will not permit this statute to be made an instrument for the perpetration of that which it was designed to prevent. According to the averments of her cross-complaint, plaintiff in error would not have entered into the marriage contract, except for the promises on the part of the one with whom she so contracted to convey to her these premises. He has failed to carry out his agreement, but by his promise, upon which she relied, she has been induced to enter into a relation from which she cannot recede, and which she is powerless to change. The result of his deception and artifice is such a fraud upon plaintiff in error, and has placed her in such situation, that the promise to convey is taken out of the statute; or, perhaps, more accurately speaking, equity will not permit it to shield such a fraud: Green v. Green, 34 Kan. 740, 55 Am. Rep. 256; Peek v. Peek, 77 Cal. 106, 11 Am. St. Rep. 244; Petty v. Petty, 4 B. Mon. 215, 39 Am. Dec. 501; Glass v. Hulbert, 102 Mass. 24, 3 Am. Rep. 418. This conclusion, however, only affects the immediate parties to the contract, and the question still remains, Can it, on the facts stated, be successfully asserted against the defendant in error? which is the second proposition raised by the demurrer. It is charged that she purchased the property with notice of

the rights of plaintiff in error, but from whom? Was she an immediate grantee of the husband, or did she take title from him or his grantee, with notice of these rights? The cross-complaint is silent on this subject. If she took title from a ²⁰¹ grantee, who was an innocent purchaser, then, even though she subsequently acquired title from him, with notice of the rights and claims of plaintiff in error, her title would be unaffected by such notice: Devlin on Deeds, sec. 747. The sufficiency of the cross-complaint having been challenged, it must appear, either expressly or by implication, that the facts necessary to entitle the plaintiff in error to relief are stated. They must state a cause of action, without any contingency attached. This rule has not been complied with; notice is charged, but whether it would affect the rights of defendant in error does not appear; for whether it would or not depends upon who was the grantor of defendant in error, and whether or not he was an innocent purchaser; but when a pleading is challenged by a general demurrer, which is sustained, and the party whose pleading is thus assailed elects to stand thereby, its sufficiency must be determined from its own averments, without being in any manner qualified, reinforced, or affected by any other considerations or conditions whatever; so that, although the facts stated take the parol agreement out of the statute of frauds, it does not appear from the averments of the cross-complaint as it now stands that it can be enforced as against the defendant in error. Both the motion to strike and the demurrer were properly sustained.

The general denial put in issue every material allegation of the complaint. The only ground upon which plaintiff relied to establish her right to the premises was that she held the fee title, and unless the deed purporting to be executed by the grantors therein named, per Waldimar Arens, their attorney in fact, was properly admitted, she has failed in this respect. There was no attempt to show that Waltemore and Waldimar Arens were, in fact, one and the same person, and the deed must have been admitted solely upon the ground that it was prima facie the act of the grantors, by virtue of the power of attorney. It is urged that this was warranted on account of the similarity of the names, Waltemore and Waldimar, and that the doctrine of idem sonans applies. In ²⁰² the matter of names, orthography is not important, if the

sound is the same: *Marr v. Wetzel*, 3 Colo. 2; and it is sufficient in law to spell a name as it is regularly or commonly pronounced (16 Ency. of Law, 126), but here the difference in the two names is so marked that the attentive ear would find no difficulty in distinguishing between them, and the difference in spelling is such that necessarily the pronunciation is equally distinct, the proper rule to observe in applying the doctrine of *idem sonans* being "that if two names, according to the ordinary rules of pronouncing the English language, may be sounded alike, without doing violence to the letters found in the variant orthography, then the variance is, *prima facie* at least, immaterial, and may be so decided by the court": 16 Ency. of Law, 122; *Rooks v. State*, 83 Ala. 79. Applying this rule, it is at once apparent from an inspection of the orthography of the two names that, in the absence of information other than thus obtained, the variance is fatal. Further objections to the introduction of the power of attorney and deed are urged by counsel for plaintiff in error, but, without noticing them in detail, it is sufficient to state that they are not tenable.

It is claimed by counsel for defendant in error that inasmuch as each of the parties claim title from a common source, namely, from the husband of plaintiff in error, the latter is estopped from objecting to the deed in question. They do not so claim, for with the cross-complaint eliminated, the only issues between the parties were those made by the complaint and general denial.

For error in admitting the deed, the judgment is reversed, and the cause remanded for a new trial, and such preliminary or other proceedings as may be proper.

ANTENUPTIAL AGREEMENT—STATUTE OF FRAUDS.—Marriage is not of itself a part performance of a verbal agreement to convey real property, in consideration of marriage, sufficient to take the case out of the statute of frauds: *Peek v. Peek*, 77 Cal. 106, 11 Am. St. Rep. 244. But it is said in *Green v. Green*, 34 Kan. 740, 55 Am. Rep. 256, that fraud takes any agreement out of the statute, and in *Glass v. Hulbert*, 102 Mass. 24, 3 Am. Rep. 418, that if a marriage is procured by artifice, upon the faith that a settlement has been made, or the assurance that it will be made, the other parties are held to make good the agreement and not permitted to defeat it by pleading the statute.

IDEM SONANS.—For applications of the doctrine of *idem sonans*, see *Pitsnogle v. Commonwealth*, 91 Va. 808, 50 Am. St. Rep. 867; *State v. White*, 34 S. C. 59, 27 Am. St. Rep. 783, and note; extended note to *Schooler v. Asherst*, 13 Am. Dec. 233, 234.

FROST v. THOMAS.

[26 Colorado, 222.]

CONSTITUTIONAL LAW—INJUNCTION AGAINST GOVERNOR.—When the governor of a state, in pursuance of his executive authority, recognizes an act as legal, and is proceeding to execute its provisions, the courts cannot directly interfere with the discharge of his duties under it, merely because it is alleged that such act is unconstitutional.

J. C. Helm, Gunnell & Hamlin, Coburn, Dudley & Lewis, and Wells & Taylor, for the relators.

B. F. Montgomery, W. H. Bryant, David M. Campbell, attorney general, Calvin E. Reed, and Dan B. Carey, for the respondent.

222 PER CURIAM. This is an original proceeding, instituted in this court by the plaintiffs, to restrain the defendant, in his capacity as governor of the state, from appointing officers for the recently created county of Teller, upon the ground that the act creating that county, and providing for the ²²³ appointment of its officers, is unconstitutional. The grounds upon which the plaintiffs rely to establish the unconstitutionality of the act, as well as the injuries which will result to them and others similarly situated, if it is carried into effect, are fully set forth in the complaint. By the act in question, the governor is authorized and empowered to appoint certain officers for the new county, and it is charged that, unless restrained, he will do so. The only question to determine is, whether or not an action of this character, on the facts stated, can be maintained against the chief executive of this commonwealth. The bill creating the county has been signed by the governor; it is his duty to see that all laws are faithfully executed, and, in pursuance of the discharge of that duty, it devolves upon him to appoint the officers designated. In so doing he performs a duty of an executive character, exercises a function governmental in its nature, because he thereby equips one of the agencies of the state necessary for the purpose of carrying on its government and carries into effect a law which the legislature, in the exercise of its powers, has seen fit to enact, and such being the character of his acts which it is sought to restrain, he is clearly independent of the other co-ordinate departments of the government, and is not

subject to their direct supervision or control. A few of the many reasons which exist why this rule obtains will be briefly noticed. Our state government is divided into three co-ordinate branches—executive, legislative, and judicial—each of which, by the constitution, has its powers limited and defined. They are of equal dignity, and, within their respective spheres, equally independent. This apportionment of power is an inhibition of the authority of one to exercise that which belongs to either of the others; and it is essential to the preservation of the autonomy of the government that there be no encroachment of one department upon another; and to this end the just limitations of the constitutional powers accorded each must be jealously guarded. The legislature may pass an act in disregard of constitutional inhibitions, but the judicial department cannot directly interfere; the executive, ³²⁴ in the exercise of his constitutional prerogative, may veto it, or in failing to do so, the judiciary, in a proper case, may refuse to recognize it as controlling; but when the governor, in pursuance of his executive authority, recognizes an act as legal, and is proceeding to execute its provisions, the courts cannot directly interfere with the discharge of his duties under it, merely because it is alleged that such act is unconstitutional; otherwise, they* would destroy those safeguards which are meant to be “checks of co-operation, and not of antagonism or mastery, and would concentrate in their own hands something, at least, of the power which the people, either directly or by the action of their representatives, decided to intrust to the other departments of the government”: *People v. Governor*, 29 Mich. 320, 18 Am. Rep. 89.

True, neither department can operate in all respects independently of the other, because each, within its own proper sphere, may impose a restraint upon the remainder; but neither can assume, directly, a superior authority over another, as each, in the exercise of their respective powers, stand on a constitutional equality; and if the judicial department of the state should attempt, in a proceeding of this character, to compel the chief executive to refrain from the performance of his duties, under the act creating the new county, it would be an usurpation of authority which alone devolves upon the executive branch of the state government to exercise: *People v. Governor*, 29 Mich. 320, 18 Am. Rep. 89; *State v. Lord*, 28 Or. 498; *Mississippi v. Johnson*, 4 Wall. 475.

The relief prayed is denied, and the action dismissed at the cost of plaintiffs.

CHIEF JUSTICE CAMPBELL dissented, because the ground upon which the writ of injunction was refused seemed to be inconsistent with the doctrine as laid down in Greenwood etc. Land Co. v. Routt, 17 Colo. 156, 31 Am. St. Rep. 284. That case was a mandamus proceeding, in which the governor was commanded to sign a patent for state land, which the court deemed to be a ministerial act, while in the present case the majority of the court held that the threatened act of the governor in making appointments to county officers was a political or governmental act. "But," said the chief justice, "neither involves any discretion, and both, in my judgment, are the same kind. . . . On an interlocutory hearing I do not think we should disregard a previous decision of this court. . . . Whether or not this application might properly be denied on other grounds is not considered by me."

INJUNCTION AGAINST EXECUTIVE OFFICER.—As to questions concerning offices and officers, an injunction does not lie against an executive officer of the state: Coleman v. Glenn, 103 Ga. 458, 68 Am. St. Rep. 108.

MANDAMUS AGAINST A GOVERNOR is discussed in People v. Morton, 156 N. Y. 136, 66 Am. St. Rep. 547, and the monographic note to Greenwood etc. Land Co. v. Routt, 31 Am. St. Rep. 294-304.

LAMAR CANAL COMPANY v. AMITY LAND AND IRRIGATION COMPANY.

[26 Colorado, 370.]

CONSTITUTIONAL LAW—TITLE OF ACT—WATER RIGHTS.—A statute, whose title reads "An act to provide for the extension of the right of way for ditches, canals, and feeders of reservoirs in certain cases, and requiring registration of all such hereafter made or enlarged," expresses one general subject, the extension of the right of way for ditches, and a section thereof which relates to the filing and recording of maps and statements of all ditches and enlargements thereof thereafter to be made, and their priorities when made, is not covered by the title, within the meaning of a constitutional provision that no bill shall be passed containing more than one subject, which shall be clearly expressed in its title, and such section is void.

APPEAL—NEW QUESTION RAISED ON.—In a petition for rehearing in an appellate court, a party cannot for the first time raise a new question, which was raised neither in the trial court nor in the appellate court at the original hearing.

APPEAL—FEDERAL QUESTION INVOLVED.—A certificate that a federal question has been presented so that it may be reviewed upon writ of error from the supreme court of the United

States will not be made, where such question is suggested for the first time in a petition for rehearing after judgment, too late for consideration by the state court.

The case turns upon the construction of the title of an act of the legislature, which act and its title are as follows:

"An act to provide for the extension of the right of way for ditches, canals and feeder [feeders] of reservoirs in certain cases, and requiring registration of all such hereafter made or enlarged.

"Sec. 1. In case the channel of any natural stream shall become so cut out, lowered, turned aside, or otherwise changed, from any cause, so as to prevent any ditch, canal, or feeder of any reservoir from receiving the proper inflow of water to which it may be entitled from such natural stream, the owner or owners of such ditch, canal, or feeder shall have the right to extend the head of such ditch, canal, or feeder to such distance up the stream which supplies the same as may be necessary for securing a sufficient flow of water into the same, and for that purpose shall have the same right to maintain proceedings for condemnation of right of way for such extension as in case of constructing a new ditch, and the priority of right to take water from such stream, through such ditch, canal, or feeder as to any such ditch, canal, or feeder shall remain unaffected in any respect by reason of such extension; provided, however, that no such extension shall interfere with the complete use or enjoyment of any other ditch, canal, or feeder.

"Sec. 2. Every person, association, or corporation hereafter constructing or enlarging any ditch, canal, or feeder for any reservoir, for irrigation, and taking water directly from any natural stream and of a carrying capacity of one cubic foot per second of time as so constructed or enlarged, shall, within ninety days after the commencement of such construction or enlargement, file and cause to be recorded in the office of the county clerk of the county in which such ditch, canal, or feeder may be situated, or if such canal, ditch, or feeder be situated in any water district, in the office of the county clerk of such county into which such water district may extend, a sworn statement in writing, showing the name of such ditch, canal, or of the reservoir supplied by such feeder, the point at which the headgate thereof is situated (if it be a new construction) the size of the ditch, canal, or feeder, in width and depth, and

the carrying capacity thereof in cubic feet per second, the description of the line thereof, and the time when the work was commenced, and the name or names of the owner or owners thereof, together with a map showing the route thereof, the legal subdivisions of the land, if on surveyed lands, with proper corners and distances, and in case of an enlargement, the depth and width, also the carrying capacity of the ditch enlarged, with the width and depth of the ditch, canal, or feeder as enlarged, and the increased carrying capacity of the same thereby occasioned, and the time when such enlargement was commenced, and no priority of right for any purpose shall attach to any such construction or enlargement until such record is made": Session Laws 1881, pp. 161, 162.

C. C. Goodale and James W. McCreery, for the appellant.

Rogers & Shafroth, for the appellees.

Goudy & Twitchell, Charles H. Toll, William R. Barbour, Ira J. Bloomfield, and C. M. Corlett, amici curiae.

³⁷³ CAMPBELL, C. J. Several important and difficult questions of irrigation law have been elaborately argued, but the disposition we make of one, that goes to the heart of the controversy and settles it, so far as concerns this review, renders unnecessary a consideration of the others. The date of priorities was established in accordance with the supposed direction of the concluding sentence of section 2 of the foregoing act. Not having made the record required in that section until after appellee's rights became thereby, as it is said, perfected, appellant's priority was fixed as of the date when its record was made, though the beginning of the work of construction antedated that of appellee. Appellant now contends that the subject matter of section 2 is not clearly, or at all, expressed in the title of the act, and, consequently, it is void under the concluding clause of section 21 of article 5 of the constitution; providing: "No bill except general appropriation bills shall be passed containing more than one subject, which shall be clearly expressed in its title; but if any subject shall be embraced in any act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed." ³⁷⁴ To the consideration of this proposition we address ourselves.

If it be granted, as appellees maintain, that the matters contained in sections 1 and 2 are but subordinate branches of one general subject that might be comprehended in a single title and treated of in one act, the concession would not be controlling in this case; for the question before us is not whether there are only subdivisions of some general subject, or whether a good title might be drawn to cover them, but, rather, Does the title which the legislature has adopted clearly express the subject embraced in section 2 of the act? The rule for determining that question has, perhaps, never been better expressed than in *In re Breene*, 14 Colo. 401, wherein it said: "The matter covered by legislation is to be 'clearly,' not dubiously or obscurely, indicated by the title. Its relation to the subject must not rest upon a merely possible or doubtful inference. The connection must be so obvious as that ingenious reasoning aided by superior rhetoric will not be necessary to reveal it. Such connection should be within the comprehension of the ordinary intellect, as well as the trained legal mind. Nothing unreasonable in this respect is required, however, and a matter is clearly indicated by the title when it is clearly germane to the subject mentioned therein."

Appellees concede that this title is ambiguous. In their attempt to show that it should be sustained, they argue that the only subject of the act is irrigation. The provisions of the act deal with parts of that subject, and, they say, if desirable to express in the title but a single phase of that general subject, it might well have been, "An act concerning priorities of right to water," since both the first and second sections have relation to priorities in case of extensions and in case of original construction. Or, as elsewhere they say, the court should thus read this title: "An act requiring registration of all ditches, canals, and feeders of reservoirs hereafter made or enlarged, and to provide for the extension of ³⁷⁵ rights of way for ditches, canals, and feeders of reservoirs." One of the friends of the court who joins with appellees in their contention would have us reconstruct the title to make it read: "An act for [concerning] ditches, canals, and feeders of reservoirs to provide for the extension of the right of way in certain cases, and requiring registration of all such [ditches, canals, and feeders] hereafter made or enlarged."

Doubtless each counsel has succeeded in drafting a good title which the legislature might have adopted, but did not; but all of them have signally failed in their attempt to show that the

title which the general assembly did pass comes up to the requirements of our constitution. We have thus stated the views and arguments of those who assert the validity of this title, for, by so doing, convincing proof is furnished of the futility of their effort, even by employing their ingenious reasoning and superior rhetoric, to show the connection between the subject matter covered by the legislation in section 2 and the subject of the act indicated by the title. The very argument employed and the illustrations furnished at best show that the subject is dubiously expressed in the title, and, for that reason, under the decision from which the foregoing excerpt is taken, section 2 must fall.

But we go further and say that, though this title contains but one general subject, the matter covered by the legislation in section 2 is clearly not germane thereto. A careful analysis of the title discloses that the general subject therein expressed is not "ditches, canals, and feeders of reservoirs," or "irrigation," but that it is "the extension of the right of way for ditches," etc. If we understand their argument, all of the counsel who uphold this title, both those directly connected with the case and amici curiae, admit that there is doubt about the antecedent of "such," whether it relates to extension of the right of way for ditches, or to the ditches themselves; while those attacking the title insist that, according to all recognized rules of construction, it relates to the extension. That these rules make "such" relate to "extension" is so plain that it is idle to argue the proposition.

376 But it is said that we do not speak of an extension as "made or enlarged," though we might say that of ditches, and, therefore, "such" relates to ditches, and not to extensions. In our irrigation statutes, the words "construction, enlargement, and extension" of ditches are frequently employed, but rarely is the "making" of ditches spoken of, though that would be a correct use of language. It is just as accurate, however, to say of the extension of the right of way for a ditch that it has been made or enlarged as to say that a ditch has been made or enlarged; for, as will be seen from section 1, extending the right of way for a ditch by carrying the headgate farther up the stream necessarily involves the making of a ditch or other conduit for carrying water, that is, the extension is made by making a ditch, etc., and such extension may subsequently involve the enlarging of its capacity. When, therefore, we use these words in speaking of an extension, we do so in precisely

the same sense, we do when speaking of making or enlarging a ditch. So the presence of "made or enlarged" in this title is not persuasive as to the point in question.

Suppose, by any stretch of construction, "such" could be said to relate to "ditches," we are still unable to perceive how the subject matter of section 2 would be valid; for, in this supposition, registration is required of such ditches only as are of the class whose headgates are carried up the stream and the right of way, therefore, has been extended as provided for in section 1, and section 2 contains no provision therefor.

Our construction of this title, then, is this: It expresses but one general subject, and that is, the extension of the right of way for ditches, etc. The registration of such extensions as may thereafter be made or enlarged is but a subordinate division of that general subject, and legislation covering that division might be included in an act containing this title, but which, confessedly, has not been attempted here.

From this it follows that the matter legislated about in **377** section 2, which relates to the filing and recording of maps and statements of all ditches and enlargements thereof thereafter to be made, and their priorities when made, is not covered by the title, and, under the concluding clause of the section of the constitution, is void as not being expressed in the title.

We have not arrived at this conclusion hastily, or without long and careful consideration; not that we entertain any doubt as to its soundness, but because, among other reasons, of the possible consequences which appellees' counsel apprehend might attend its announcement. Upon the original oral argument we recognized the gravity of the question, and were then of opinion that section 2 could not be sustained. But as it was, and is, our duty to resolve every doubt in favor of the statute, and to declare it valid if it is consistent with our organic law, after a careful examination of the printed briefs, of our own motion, and with the view, if possible, to obtain further light, we requested a second oral argument by the counsel for the parties to the cause, and permitted other counsel, as friends of the court, connected with other cases involving the same question, to appear thereat and also file printed briefs. After a thorough consideration of the questions involved, aided by the research of learned counsel, our former opinion is confirmed, and we have nothing to do but declare this section invalid, because it so clearly is inhibited by our constitution.

The dangers and confusion which counsel have pointed out as likely to follow this decision are largely imaginary. Rights, if any, which have become vested, priorities, if any, which have been established by decree of court upon the basis of this act, and by the lapse of time cannot be reviewed, are certainly protected. Other rights, if any, which have been settled by judicial decree, but not so as to be beyond the reach of review, or such as are now in process of adjudication, will be determined in accordance with the law as it is and always has been, and not as this invalid act prescribes. The mere fact that the statute has been in existence for eighteen ³⁷⁸ years, while a proper matter for consideration, is not controlling. It is of common knowledge that almost from the time of its passage the question of its validity has been mooted among the members of the bar, and we know that in this court its constitutionality has been repeatedly raised, though its determination has not hitherto been necessary. Certainly, the appellant has been diligent in raising it, and made the objection at the first opportunity, and has persistently followed it up.

As the appellant claims that the quantity of water awarded it by the decree was not sufficient, and as the appellees contend that, in the absence of the statutory test of the date of priority, there is not sufficient definite evidence in the record to determine it, we have deemed it best, in the conflict of the testimony and the uncertainty that necessarily must be present when it is considered that the court below, in establishing and fixing the dates of the priorities, proceeded upon an improper basis, not to attempt a reformation of the decree; but rather to remand the proceeding with instructions to the district court to vacate the decree in so far as it affects the canal of the appellant, and to proceed either upon the testimony now before it, or, if the parties, or either of them, so desire, to take additional evidence, and upon all of the evidence to make findings and enter a decree to conform to the views expressed in this opinion.

The decree, therefore, is reversed, and the cause remanded.

PETITION FOR REHEARING.

PER CURIAM. In support of their petition for a rehearing, counsel for appellees have urged the same matters that were previously heard. Further consideration of the important question involved has not resulted in a change of our views.

In an additional brief in support of the application, for the first time the point is made that, inasmuch as they made their appropriation of water in accordance with the provisions ³⁷⁰ of the statute in question, and relying upon the same as valid, incurred expenses and made investments upon the strength of it, and since the legislative and executive departments of the state have recognized its validity since its passage, the appellees have acquired a vested right to their appropriation which, after it was so perfected, it is as much beyond the power of this court as it would be of the legislature to destroy: and that, if the decision in this case holding unconstitutional the statute should now be applied to them, the practical effect would be to impair the obligation of a contract between appellees and the state which was virtually entered into when appellees made their appropriation upon the faith of the validity of the law.

In passing, it is pertinent to remark that the supreme court of the United States has held that to "come within the provision of the constitution of the United States which declares that no state shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by some act of the legislative power of the state, and not by a decision of its judicial department only": *Central Land Co. v. Laidley*, 159 U. S. 103. But we shall not enter upon the investigation of this question, or make any determination concerning it, for, under well-recognized rules of practice, the appellees cannot, in a petition for rehearing, for the first time raise a new question. Neither in the trial court nor in this court at the original hearing was any such question mooted, and it cannot now be injected into the case: *Orman v. Ryan*, 25 Colo. 383, and cases therein cited.

Learned counsel request, if we adhere to our former opinion, that we make the proper certificate that a federal question has been presented so that it may be reviewed upon writ of error from the supreme court of the United States. If, in a proper case, a certificate be necessary, we cannot give it in this case, for we have just decided that the federal question attempted to be raised was presented too late for our consideration. Moreover, if we should comply with the ³⁸⁰ request and make the desired certificate—which we would gladly do if it was proper—it would not avail appellees, though perhaps it is not for us, but for the federal court, so to determine. For when, in the state court, "the federal question is suggested for the

first time in a petition for rehearing after judgment, it is not properly raised, so as to authorize the supreme court of the United States to review the decisions of the highest court of the state": *Bushnell v. Crooke Min. Co.*, 148 U. S. 682; *Desty's Federal Procedure*, 9th ed., sec. 223; *Texas etc. Ry. v. Southern Pac. Co.*, 137 U. S. 48; *Butler v. Gage*, 138 U. S. 52; *Leeper v. Texas*, 139 U. S. 462.

The petition for rehearing will be denied, and it is so ordered.

CONSTITUTIONAL LAW—TITLE OF ACT.—An act respecting irrigation, or to provide for water rights and irrigation, is valid where the provisions of the statute are germane to the subject expressed in the title: See the monographic note to *Bobel v. People*, 64 Am. St. Rep. 102, on the sufficiency of titles to statutes. See, too, *State v. Tibbets*, 52 Neb. 228, 66 Am. St. Rep. 492; *Pittsburgh etc. Ry. Co. v. Montgomery*, 152 Ind. 1, 71 Am. St. Rep. 301.

APPEAL—AN ORIGINAL QUESTION cannot be raised for the first time on appeal: *Woods v. Bryan*, 41 S. C. 74, 44 Am. St. Rep. 688. See, too, *Parrish v. Mahany*, 12 S. Dak. 278, 76 Am. St. Rep. 604.

IN RE MORGAN.

[26 Colorado, 415.]

CONSTITUTIONAL LAW—EIGHT-HOUR LAW.—A statute which imposes a restriction upon workmen in underground mines and smelters as to the number of hours they shall work is unconstitutional and void, because it is an unwarrantable interference with the right of contract in a purely private business, and because it arbitrarily singles out a class of persons, and imposes upon them restrictions from which others similarly situated are exempt.

POLICE POWER—EIGHT-HOUR LAW.—A statute which prohibits a man from working more than eight hours a day in a purely private, lawful business, in which no special privilege or license has been granted by the state, and the carrying on of which is attended by no injury to the general public, on the ground that working longer may, or probably will, injure his health, is not a valid exercise of the police power.

Petition for a writ of habeas corpus. The petitioner was prosecuted upon a charge of contracting to labor in a smelter in excess of eight hours per day. In default of bail, he was committed to jail. The prosecution was under "An act regulating the hours of employment in underground mines, and in smelting and ore reduction works, and providing penalties for violations thereof." A part of the act reads as follows:

"Sec. 1. The period of employment of workingmen in all underground mines or workings shall be eight (8) hours per day, except in cases of emergency, where life or property is in imminent danger.

"Sec. 2. The period of employment of workingmen in smelters, and in all other institutions for the reduction or refining of ores or metals, shall be eight (8) hours per day, except in cases of emergency, where life or property is in imminent danger."

Section 3 makes the violation of the foregoing provisions a misdemeanor, and provides the penalty therefor: Session Laws 1899, p. 360. The following sections of the constitution are referred to in the opinion:

"Article 2.

"Sec. 1. That all political power is vested in and derived from the people; that all government, of right, originates from the people, is founded upon their will only, and is instituted solely for the good of the whole."

"Sec. 3. That all persons have certain natural, essential, and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property, and of seeking and obtaining their safety and happiness."

"Sec. 23. The enumeration in this constitution of certain rights shall not be construed to deny, impair, or disparage others retained by the people."

"Article 5.

"Sec. 25. The general assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: . . . Subdivision 23. Granting to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise whatever. Subdivision 24. In all other cases, where a general law can be made applicable, no special law shall be enacted."

Wolcott & Vaile, John M. Waldron, C. W. Waterman, Charles H. Toll, and W. W. Field, for the petitioner.

David M. Campbell, attorney general, Calvin E. Reed, Dan B. Carey, Booth M. Malone, Daniel Prescott, T. M. Patterson, and John H. Murphy, for the respondent.

⁴¹⁷ CAMPBELL, C. J. The petitioner challenges the validity of the statute as inhibited by the foregoing clauses of the organic law. The position of the attorney general is that it was passed as a health regulation, and may be vindicated as coming within the range of the police powers of the state. Four years before it became an act this court, to an inquiry of the house of representatives of the tenth general assembly as to the constitutionality of a bill reading, "Eight hours shall constitute a legal day's work for all classes of mechanics, workmen and laborers employed in any mine, factory, or smelter of any kind whatsoever in the state of Colorado," replied that it was "not competent for the legislature to single out the mining, manufacturing, and smelting industries of the state and impose upon them restrictions with reference to the hours of their employes from which other employers of labor are exempt." And it was further said that the section "violates the right of parties to make their own contracts—a right guaranteed by our bill of rights": In re Eight Hour Bill, 21 Colo. 29.

The twelfth general assembly must have been aware of this and another decision concerning the power of the legislature to pass what is called a coal screening bill—the opinion being reported at page 27, same volume—in which this species of legislation was condemned as hostile to the constitution. But wholly disregarding these decisions, binding alike on all ⁴¹⁸ departments of government, it proceeded to enact the measure now before us. Though it affords no justification for such legislative action in defiance, and against the solemn decision, of this court, we presume the excuse that might be offered therefor is that, after these decisions were handed down, in a sister state an act in the same language was passed and approved by its highest court, and, as is claimed, sanctioned by the supreme court of the United States. Following the rule of stare decisis, we might content ourselves with a mere affirmation of our previous announcements, made, as they were, upon full consideration; but in view of the importance of the questions involved, we have thought it best fully to discuss the principles by which this act must be tested.

The question presented for our determination is, Does the act under which the petitioner is being prosecuted violate any constitutional provision? In this resolution the provisions of our own constitution must govern. Decisions of other jurisdictions, defining the limits of legislation under their constitu-

tions, are not always to be followed elsewhere, upon the supposition that the same limitations everywhere prevail. This is illustrated in the answer of the judges of the supreme judicial court of Massachusetts in response to an inquiry by the house of representatives as to the validity of a proposed bill. In the course of the opinion, after referring to the fact that legislation similar to that proposed had been held by the courts in some states unconstitutional on different grounds, and without expressing an opinion as to the correctness of those decisions, tested by the respective constitutions, the honorable judges said: "The legislative power granted to the general court by the constitution of Massachusetts is, perhaps, more comprehensive than that found in the constitutions of some of the other states": *In re House Bill No. 1230* (Opinion of Justices), 163 Mass. 591.

A similar observation was made by the supreme court of Illinois in *Ritchie v. People*, 155 Ill. 98, 46 Am. St. Rep. 315. It is peculiarly appropriate, we think, to our organic act. A comparison of many ⁴¹⁹ other constitutions with ours shows that the latter probably contains more restrictions upon the power of the legislature than are to be found in any other instrument; and whether measured by the decisions of the courts of that state, or as the result of our own construction, we think it clear that the general court of Massachusetts has, in the field of legislation under review, much wider latitude, and is hampered by fewer restrictions than is our general assembly.

The extent and meaning of the act in question are not difficult of ascertainment, though it is not a model of statutory composition. That it operates as a limitation both upon the employer and the employé seems clear. It forbids a certain kind of employment. There can be no employment without the concurring acts of him who contracts for employment and of him who contracts to be employed. Both are within the inhibitions of the enactment; and if it is valid, each is liable to the penalty for making the forbidden contract. The petitioner, therefore, as a laboring man, is prohibited from entering into a contract to work in a smelter more than eight hours in any one day.

If, in our constitution, there was, as there seems to be in that of Utah, a specific affirmative provision enjoining upon the general assembly the enactment of laws to protect the health of the classes of workingmen therein enumerated, it might be that acts reasonably appropriate to that end would

not be obnoxious to that provision of our constitution forbidding class legislation; for it could hardly be said that a classification made by the constitution itself was arbitrary or unfair, or that it clashed with another provision of the same instrument inhibiting class legislation. The two provisions should be construed together, so as to harmonize, if that be possible, under sound canons of construction, and the general clause forbidding class legislation might be regarded as qualified by the special one which authorizes such legislation in respect to the enumerated classes.

Article 16 of our constitution is devoted to mining and irrigation, and section 2 directs that "the general assembly ⁴²⁰ shall provide by law for the proper ventilation of mines, the construction of escapement shafts, and such other appliances as may be necessary to protect the health and secure the safety of the workmen therein." These regulations manifestly embrace only such reasonably necessary mechanical appliances as will secure the end in view, and do not include other kinds of health regulations.

Whether this command, addressed to the legislature, to protect the health of these workmen by requiring the mines to be furnished with the appliances specified, does not restrict the law-making power to the things named, on the principle that when authority to do a particular thing is given and the mode of doing it is prescribed, all other modes are excluded, might be a material inquiry where the validity of the act was challenged by a miner; but as that question relates to workmen in mines, and not in smelters, we prefer to put our decisions upon impregnable grounds that cover both cases.

Be that as it may, we have no constitutional provision which authorizes the legislature to single out workingmen in underground mines and smelters, and impose upon them restrictions as to the number of hours they shall work at these industries, from which workingmen in all other departments of industry are exempt. To this effect is our decision in *In re Eight Hour Bill*, 21 Colo. 29, and we have heard no argument in the case at bar, nor have we been cited to any authority that leads us to a different conclusion.

The act is equally obnoxious to the provisions of our bill of rights, set out in the statement, which guarantees to all persons their natural and inalienable right to personal liberty, and the right of acquiring, possessing, and protecting property. Liberty means something more than mere freedom from physical

restraint. It includes the privilege of choosing any lawful occupation for the exercise of one's physical and mental faculties which is not injurious to others. The right to acquire and possess property includes the right to contract for one's labor. The latter is essentially a property right. The arbitrary classification of rights into rights of ⁴²¹ persons and rights of things, made by Blackstone and other jurists for purposes of convenience in treatment, has been the occasion for hostile criticism by those favoring socialistic or paternal legislation. Employing the argumentum ad hominem, they say that those decisions in which courts have carefully guarded rights of property put property above the man. A moment's calm reflection will show the falsity of this charge.

Property, as such, has no claim upon the protection of the law. When a property right is spoken of, the right of some person over, or concerning, the property is meant. All rights recognized by the law pertain to persons, natural or artificial. The absolute rights are commonly designated as personal rights. They are such as are annexed to the person, like life and reputation, while property rights are those unconnected with the person, but which, none the less, belong to some person. All rights, both those spoken of as personal and those denominated as property rights, belong to the individual citizen, and when it is said that property rights must not be infringed, what is meant is merely that the right of some person to, or concerning, property must not be interfered with. That this act infringes both the right to enjoy liberty and to acquire and possess property, seems too clear for argument. While not conceding that this limitation is not permissible, counsel for respondent, as we understand them, recognize the fact (but if they do not, the same is only too apparent) that these natural rights are violated by the provisions of the act. The limitation is claimed to be warranted on the ground that these and all other constitutional guaranties must yield to the paramount and sovereign right of the state to exercise its police power to protect the public health; and to this, the principal question in this proceeding, we now address ourselves.

The protection of the public health is mentioned neither in the body of the act nor in its title, as is usually the case in similar acts of other states. When it is clearly perceived from the terms of an act that the thing prohibited necessarily ⁴²² affects the public health, it may not be necessary expressly to

declare therein what the object of the act is; but where the result is doubtful, the object of the act ought, somewhere and somehow, to be stated, and, in accordance with some decisions, must be thus proclaimed, else the act will be held invalid on the ground that it is deceptive in not expressing its real object. Possibly, such declarations would not be conclusive that its real character is what it is expressed to be, any more than the absence of a declaration would be that such was not its true nature. Where there is a mandatory requirement in the constitution (Const., art. 5, sec. 21) that no bill except the general appropriation bill shall contain more than one subject, which shall be clearly expressed in the title, the title of this act is at least questionable. Certainly, unless "regulating the hours of employment" is synonymous with, or equivalent to, "protecting the public health," the title would seem to be dubiously stated. But as counsel have not made this point, we pause only to mention, but not to decide it.

It is upon the hypothesis, however, that it is the duty of the judiciary to sustain every act of the legislative department, if it can be done on any conceivable rational constitutional ground, that, for the present purpose, we assume with counsel for respondent that the object of the legislature was the enactment of a health measure, and that, in effectuating the same, it has complied with the clause of the constitution just referred to.

Starting, then, with the premise, which is practically admitted to be true, that this act contravenes the constitutional provisions quoted in the statement, let us see if, notwithstanding this conflict, it can be justified as a valid exercise of the police power. It is difficult to define, or with precision to describe, the police power. It has rarely been attempted by the courts, and the attempt has never been attended with complete success. Following the authorities, we may say that it extends to the protection of the public health. It is upon the specific ground that limiting the time a workingman ⁴²³ may labor in a smelter to eight hours a day conduces to, and preserves, the health of the laborer himself, that this act is sought to be upheld. With sincere respect for the ability of the courts in whose opinion the remarks are found, but with a profound conviction of their erroneous conception of the nature and limits of the police power, we submit that much loose reasoning has been indulged in, and some decisions rendered that cannot be defended upon principle. As we understand it, the

police power is the name given to that function of government by which is enforced the maxim, *Sic utere tuo ut alienum non laedas*. In Cooley's *Constitutional Limitations*, sixth edition, 208, we read that this maxim "is that which lies at the foundation of the power." Professor Tiedeman, in his work on the *Limitations of Police Power*, in section 1, says: "The object of government is to impose that degree of restraint upon human actions which is necessary to the uniform and reasonable conservation and enjoyment of private rights. . . . The conservation of private rights is attained by the imposition of a wholesome restraint upon their exercise, such a restraint as will prevent the infliction of injury upon others in the enjoyment of them."

He further quotes with approval the language of Judge Redfield in the case of *Thorpe v. Rutland etc. R. R. Co.*, 27 Vt. 140, 62 Am. Dec. 625: "This police power of the state extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state. According to the maxim, *Sic utere tuo ut alienum non laedas*, which being of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which everyone may so use his own as not to injure others."

And Professor Tiedeman immediately follows this quotation with the statement that: "Any law which goes beyond that principle, which undertakes to abolish rights, the exercise of which does not involve an infringement of the rights of others, or to limit the exercise of rights beyond what is necessary to provide for the ⁴²⁴ public welfare and the general security, cannot be included in the police power of the government."

It thus appears that, in proceeding under this power, the legislature must choose proper subjects for its exercise, and must observe constitutional limitations just as closely as when it enacts laws pertaining to the public revenue, or provides for the exercise of the power of eminent domain. In our form of government, unlimited power does not exist in any department: *Prentice on Police Powers*, 267; *Loan Assn. v. Topeka*, 20 Wall. 655; and whenever the constitutionality of an act of any department is challenged, the judicial department is the final arbiter.

Notwithstanding this general rule, we are here met with the argument, and the assertion is baldly made, that in the

exercise of its police power, the legislature is subject to no restriction except its own unbridled discretion as to what subjects it may select for regulation, and the kind of regulation it may prescribe. We cannot assent to this doctrine. It may find apparent sanction in unguarded expressions of text-writers, or in judicial opinions, but it is contrary to every well-considered decision. It is for the legislature to determine the exigency, that is, the occasion, for the exercise of the power; but it is clearly within the jurisdiction of the courts to determine what are the subjects upon which the power is to be exercised, and the reasonableness of that exercise: *Tiedeman's Limitations of Police Power*, sec. 3; *People v. Jackson etc. Plank Road Co.*, 9 Mich. 285; *Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 191; 18 Am. & Eng. Ency. of Law, 746 et seq.; *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465.

In that great repository of constitutional learning, Cooley's *Constitutional Limitations*, Judge Cooley, at page 208 (sixth edition), well says: "The maxims of Magna Charter and the common law are the interpreters of constitutional grants of power, and those acts which by those maxims the several departments of government are forbidden to do cannot be considered within any ⁴²⁵ grant or apportionment of power which the people in general terms have made to those departments."

This observation, as we take it, is as pertinent to the general police power vested in, though not expressly conferred upon, the legislature under written constitutions, as it is to some express power therein delegated. At page 711 of the same work is quoted with approval the following language of Judge Christiancy found in his able opinion in *People v. Jackson etc. Plank Road Co.*, 9 Mich. 285: "Powers which can only be justified on this specific ground [that they are police regulations], and which would otherwise be clearly prohibited by the constitution, can be such only as are so clearly necessary to the safety, comfort, and well-being of society, or so imperatively required by the public necessity as to lead to the rational and satisfactory conclusion that the framers of the constitution could not, as men of ordinary prudence and foresight, have intended to prohibit their exercise in the particular case, notwithstanding the language of the prohibition would otherwise include it."

The opinion in *Palmer v. Tingle*, 55 Ohio St. 423, discusses the nature of the police power. Reserving opinion as to the

correctness of the determination of the court in that case with reference to the law before it, which has been repudiated in *Jones v. Great Southern etc. Hotel Co.*, 86 Fed. Rep. 370, its remarks in discussing one phase of the general subject meet with our approval. In reply to the argument of counsel, who claimed the most sweeping power of the legislature in restricting the right of contract, when the general good requires it, the court said: "It may be restrained only in so far as it is necessary for the common welfare and the equal protection and benefit of the people. That such restraint of the right and liberty of contract is for the common public welfare and equal protection and benefit of the people, must appear, not only to the general assembly, by force of popular clamor, or the pressure of the lobby, but also to the courts; and it must be so clear that a court of justice, in the calm deliberation of its judgment, ⁴²⁶ may be able to see that such restraint is for the common welfare and equal protection and benefit of the people." To the same effect see *Spry Lumber Co. v. Sault Sav. Bank etc. Co.*, 77 Mich. 199, 18 Am. St. Rep. 396.

In the light of these principles, every act of this character must be tested. While invoking, as a warrant for this act, that phase of the police power extending to the public health, its supporters do not claim that its real and primary object is to protect the public health, or the health of that portion of the community in the immediate vicinity, or affected by the operation of smelters. If that purpose is present at all, it is only so inferentially, and the means employed to secure it are neither adequate nor appropriate. The smelting of ores is a continuous process, night and day, the year through. It is not claimed that the business is injurious to public health. It would be absurd to argue that, while the process itself is continuous, limiting the hours of those laboring in a smelter in anywise conduces to preserve the health of any portion of the public. That is to say, three shifts of laborers, working eight hours each, would affect the public health to the same extent, if at all, as would two shifts at twelve hours each. It is not contended that the business of smelting is unlawful; nor is it claimed that the act was passed to prevent employers from perpetrating fraud upon employes, or to protect the latter from trespasses. Indeed, the only object that can rationally be claimed for it is the preservation of the health of those working in the smelters.

Were the object of the act to protect the public health, and its provisions reasonably appropriate to that end, it might be sustained; for in such a case even the constitutional right of contract may be reasonably limited. But the act before us is not of that character. In selecting a subject for the exercise of the police power the legislature must keep within its true scope. The reason for the existence of the power rests upon the theory that one must so use his own as not to injure others, and so as not to interfere with or injure the public health, safety, morals, or general welfare. How can ⁴²⁷ one be said injuriously to affect others, or interfere with these great objects, by doing an act which confessedly visits its consequences on himself alone? And how can an alleged law, that purports to be the result of an exercise of the police power, be such in reality, when it has for its only object not the protection of others or of the public health, safety, morals, or general welfare, but the welfare of him whose act is prohibited, when, if committed, it will injure him who commits it, and him only? The maxim does not read, So use your own right or property as not to injure yourself or your own property.

Perceiving the inconsistency that must follow an attempt to vindicate a law on the principle that underlies the police power, counsel adroitly invoke the maxim, *Salus populi suprema est lex*. So far as we can ascertain, no commentator and no judge has ever sought to borrow this wholesome maxim and use it as a prop to uphold a law whose object is to protect a man against himself. The welfare of the people is indeed the supreme law, but this maxim cannot be twisted to sustain a law violating private rights which contemplates the promotion of the welfare of less than the entire people. Our bill of rights expressly says that government is instituted solely for the good of the whole.

In this we must not be understood as limiting the legislature, where the facts justify apparent discrimination, in passing health laws affecting only certain classes. Indeed, laws having for their object the protection of small portions of a community have been upheld, as in *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, where a nuisance, obnoxious probably only to part of a village, was abated; but what we mean to decide is that in a purely private, lawful business, in which no special privilege or license has been granted by the state, and the carrying on of which is attended by no injury to the general pub-

lic, it is beyond the power of the legislature, under the guise of the police power, to prohibit an adult man who desires to work thereat from working ⁴²⁸ more than eight hours a day, on the ground that working longer may, or probably will, injure his own health.

Ah *Lim v. Territory*, 1 Wash. 156, held valid an act of the territory providing that any person who smoked or inhaled opium was guilty of a misdemeanor, notwithstanding the object, or, at least, one object, of the act was to protect the smoker or inhaler himself from the effect of his own act. This regulation was thought by three of the five judges to be warranted by a provision of the organic act of the territory (no question of conflict with a state constitution being in issue), extending, as they said, "the power of the territorial legislature to all rightful subjects of legislation, and when once we concede the rightfulness of the subject, the extent and character of the legislation on that subject cannot be called in question by the courts." Possibly, some courts would uphold such legislation, if confined to appropriate cases, on the ground that smoking or inhaling opium was necessarily demoralizing to society, degrading to public morals, and injurious to the general welfare. But the position taken by the Washington tribunal that courts cannot inquire into the character of an act, or question legislation, finds no sanction in any well-considered case or standard text-book. In the dissenting opinion the true doctrine is recognized.

In some of the other cases are found such expressions (*dicta*, it is true) as that the state has such an interest in each citizen that it may protect him against the consequences of his own rashness; and upon the theory that the state is made up of the sum of all its parts, it may, for each individual, and for his supposed good, prescribe any regulations that are appropriate and suitable for the whole. In other words, this theory is based upon the proposition that each part making up the whole includes the whole itself in the same sense that the whole includes each part. This, in principle, is the same as the theory that would authorize the state to prescribe any regulations it saw fit for keeping a citizen out of its jails, hospitals, or poorhouses, because it is a legitimate function ⁴²⁹ of government to levy and collect taxes to build such institutions. The argument in support of such a theory is specious; and while in one sense (but to a limited extent only) true, yet, like all argument from analogy, it is dangerous, and should be care-

fully circumscribed. If the theory is correct, the state would be justified in prescribing the most minute details for the regulation of the personal conduct of individual citizens, as to things in no wise affecting the great public interests. Whenever a man fails in business, or loses a fortune by some great calamity, or droughts or floods destroy his crops, the legislature could levy a tax, or make an appropriation, and therefrom establish him in business, or make good the loss. The practical application of the theory would destroy the fundamental principles upon which our government is founded.

Let us make some further applications of this principle, and see to what such legislation would lead. It is, of course, no objection to this act to say that hereafter the legislature may pass another act that is invalid. But if the principle of the decision by which the present one is saved, in its logical extension, will protect others that every rational mind will declare void, it is well to stop for reflection, for it is a question of power and not discretion we are now considering. The business of operating smelters and working underground mines is purely a private business. It is not affected with a public interest, or devoted to a public use. Even here the general and better rule is that regulation of such businesses are confined to their public side, and do not descend to interference in contracts and strictly private dealing between employers and employés. Hence, smelting does not come within the operation of the principle of those decisions in which have been upheld reasonable regulations of a business affected by a public interest. If, to protect the health of workmen engaged in these two occupations, the legislature may limit them to eight hours' labor per day, it may hereafter, upon the ground that idleness, resulting from short hours of labor, leads to drunkenness and gambling, ⁴³⁰ and industry, promoted by longer hours, to happiness and health, enact that workmen must labor at these occupations fourteen or sixteen hours per day; and by extending the same principle to other occupations, it may say, to use an illustration employed in argument, that a man weighing one hundred and twenty pounds or less shall not work in a stone quarry, because only large and powerful men can safely work therein; that only men free from a tendency to tuberculosis shall work at indoor occupations, because those so afflicted need more pure air and sunshine than they can get if excluded from the open air; that only persons not needing the aid of eyeglasses shall become makers or repairers of watches,

because labor, with such mechanical aids, upon delicate mechanisms tends to destroy vision; or that those suffering from sluggish livers shall not engage in sedentary occupations, because their health demands active, muscular effort. Then it is only one step further to provide by law the style and quality of garments the citizen may wear, the quantity and quality of food he may eat, and the beverage he may drink. And because one cannot support and properly educate his family for less than a certain amount of money, the legislature may declare that, to promote the general welfare, no employer shall contract to pay, or pay, an employé less than an arbitrary wage so fixed as to produce the required sum.

Such, and other, illustrations that readily suggest themselves are germane, and each and every supposed act could be sustained upon the same principle that would make the act before us valid. If counsel's contention be sound, that to promote the general welfare and protect the public health or safety, the legislature is above the constitution and brooks no restraint; if it is the sole judge, not merely of the exigency, but also of the subjects for the exercise of the police power and its reasonableness—then, indeed, all these, and almost all other conceivable regulations of private affairs are permissible. If we stop to consider the form of the government under which we live, and what pains the framers of our organic acts⁴³¹ took to protect the rights of the individual citizen, we would naturally expect to find that measures passed for the alleged protection of the citizen against the consequences of his own acts would clash with constitutional safeguards inserted therein to conserve the inalienable rights of men.

This maxim, like many others, has been much abused; but restricting legislation to measures clearly within its scope is not abusing, but merely giving proper effect to it.

In this connection we notice, what has already been suggested, an argument pressed upon us in support of this species of legislation. We are told that the law is, to a large extent, a progressive science; that during our national existence many changes and reforms, both in procedure and in substantive law, have been made; and that to conform to the complex conditions of modern society and to solve the many problems arising out of the industrial relations, many more such will likely take place, and the law will be forced to adapt itself to these new conditions, if society is to be kept together and government preserved.

We are not disposed to dispute the accuracy of these observations or the correctness of the prediction made, but we fail to perceive the force of the application to the statute in hand. Such legislation does not denote an advance in the law of the domestic relations. On the contrary, it is a distinct and emphatic return, a retrogression, to that period in English history when parliament busied itself in passing numerous acts interfering with the freedom of conscience in religious matters, and in prescribing minute regulations of the personal conduct of the individual, against which our ancestors rebelled, and which was one, among other causes, that prompted them to found here a government under which it would be impossible thus to interfere with the purely private affairs of the citizen.

Our conclusion as to the invalidity of this act is grounded upon principle. Let it now be tested by the authorities. Except as to the penalty, the act is identical in terms with a law of Utah which, in three cases in the supreme court of ⁴³² that state, has been held valid; and in two of the cases on writ of error from the supreme court of the United States the judgment of the state court has been affirmed: *State v. Holden*, 14 Utah, 71; *State v. Holden*, 14 Utah, 96; *Short v. Bullion etc. Co.*, 20 Utah, 20; *Holden v. Hardy*, 169 U. S. 366.

They are the only authorities directly in point that are cited as sanctioning our act, and the only additional ones which may fairly be considered, either in the reasoning of the opinions or in the principles involved, as tending to uphold it, are *Commonwealth v. Hamilton Mfg. Co.*, 120 Mass. 383, and *State v. Peel Splint Coal Co.*, 36 W. Va. 802. In the Massachusetts case the act construed provided that, "No minor under the age of eighteen years, and no woman over that age, shall be employed in laboring by any person, firm, or corporation in any manufacturing establishment in this commonwealth more than ten hours in any one day," etc. This enactment, under some authorities, might be held valid, applying, as it does, only to women and minors, since the former class, on account of sex and supposed physical infirmities, and the latter, because of their tender age, are under the guardianship of the state, and not standing on an equality with adult men, are subjects of restraining regulations. But it is not clear whether the act was sustained on this ground, or that it was a valid police regulation. Probably not the latter, for the court remarked that such legislation might be maintained either as a health or

police regulation, if it were necessary to resort to those sources for power. If the former, the case would not be apposite. Whatever the basis for the decision may be, the reasoning of the court in support of it is not satisfactory, for in answer to the argument that the prohibition of the act violated the right of an adult woman to labor as many hours per day as she chooses, the court said:

"The obvious and conclusive reply to this is, that the law does not limit her right to labor as many hours per day or per week as she may desire; it does not in terms forbid her laboring in any particular business or occupation, as many ⁴³³ hours per day or per week, as she may desire; it merely prohibits her being employed continuously in the same service more than a certain number of hours per day or week, which is so clearly within the power of the legislature, that it becomes unnecessary to inquire whether it is a matter of grievance of which this defendant has the right of complaint."

We may apparently digress to remark that if this construction is correct, and if the real object of the act be to protect the health of a certain class of working women by shortening the hours of labor, that object is frustrated, since, if the act permits one of the designated class, after working the eight hours, to engage in any other than the forbidden kind of labor for as many additional hours as she choose in any one day, practically there is no limit at all upon the length of time that she may work, provided she can get employment.

But the disposition made of the case evades the real question. To one who desires to devote her entire time and energies in laboring at one particular occupation in which the legislature seeks to restrict her, it is no answer to say that her right to make contracts for her labor is not curtailed because she may work as many additional hours as she pleases at some other occupation. The value of the right consists in freedom to labor in any lawful business she may select, for as many hours each day as she chooses.

This case is the only authority cited in some of the textbooks for legislation of this character; but we cannot follow it. Its doctrine, as applicable to adult men at least, is materially weakened, if not overthrown, by the subsequent decision in *Commonwealth v. Perry*, 155 Mass. 117, 81 Am. St. Rep. 533, where an act providing that no employer shall impose a fine upon an employé engaged at weaving, or withhold his

wages, in whole or in part, for imperfections that may arise during the process of weaving, was held to be in conflict with the constitution of that commonwealth, as interfering with the right of acquiring, possessing and protecting property; and in the latter case are cited with approval several authorities hereinafter to be discussed, which are squarely in conflict with the former.

434 In the constitution of Utah there is an entire article (16) devoted to the rights of labor. For our present purpose, sections 1, 6, and 7 only need be here reproduced. They are:

"Section 1. The rights of labor shall have just protection through the laws calculated to, promote the industrial welfare of the state."

"Sec. 6. Eight hours shall constitute a day's work on all works or undertakings carried on or aided by the state, county or municipal governments; and the legislature shall pass laws to provide for the health and safety of employes in factories, smelters and mines.

"Sec. 7. The legislature, by appropriate legislation, shall provide for the enforcement of the provisions of this article."

While disclaiming any expression of opinion as to whether the act in question might or might not be upheld as an exercise of the police power which, though unexpressed in the constitution, resides in every sovereign state, the supreme court of Utah clearly grounded its decision upon the mandatory nature of the foregoing section 6. The imperative command thereof was thought to operate both upon the legislature and the courts; upon the legislature as an express injunction requiring the enactment of legislation to protect the health of the classes enumerated, and upon the courts as an implied restriction, withdrawing from them an inquiry into such legislation as should be passed in obedience to that command, upon which investigation, in the absence of the constitutional limitation, and with respect to such legislation as comes within the range of the general police power, the court might enter to ascertain if it accords with the constitution. This extract from the opinion of Zane, C. J., bears out our statement: "The provision of the state constitution quoted makes it the duty of the legislature to 'pass laws to provide for the health and safety of employes in factories, smelters, and mines.' And we are not authorized to hold that the law in question is not calculated and adapted in any degree to promote the health and

safety of persons working in mines and ⁴³⁵ smelters. Were we to do so, and declare it void, we would usurp the powers intrusted by the constitution to the law-making power."

And the remark of Mr. Justice Brown, in *Holden v. Hardy*, 169 U. S. 366, further corroborates it, when he said: "The supreme court of Utah was of opinion that if authority in the legislature were needed for the enactment of the statute in question, it was found in that part of article 16 of the constitution of the state which declared that 'the legislature shall pass laws to provide for the health and safety of employes in factories, smelters, and mines.'"

As the question is not necessarily before us, perhaps we properly withhold opinion upon it; but we are not prepared to say, with counsel for petitioner, that this provision of the Utah constitution is so far different from ours that the former instrument will, and the latter will not, permit of such legislation. Rather we may say that we are impressed with the able argument of counsel appearing amici curiae in behalf of the law, wherein they maintain with strong reasoning that the presence in the Utah constitution of article 16, on which the Utah court founded its decision, adds nothing to the power which the legislature would have without it; unless it be, as we are disposed to concede, that its presence removes the objection that otherwise might be made to an act on the ground that it is class legislation. However this may be, upon the claim that the decision of the state court in the Utah cases is a precedent for us, it is sufficient now to say that no effort was there made, as there is here, to vindicate the law as a valid exercise or the general unwritten police power; and for this reason the cases cannot be treated as authority. And since we are entitled to presume that the court there chooses the strongest, if not the only ground on which to rest its determination, but little, if any, weight is to be given to the claim that the reasoning of the opinion supports respondent's contention that our act is in harmony with our own constitution.

It is chiefly on account of the authoritative character of ⁴³⁶ decisions of the supreme court of the United States that we are asked to uphold this act. It goes without saying that if a federal question were involved in the case at bar, and had been passed upon by that tribunal, our duty in the premises would be clear. But the petitioner does not invoke the protection of any provision of the national constitution; he maintains that his sacred rights of liberty and freedom of contract

embraced in his right of property, and his exemption from arbitrary and unjust discriminations, all of which are guaranteed to him in the sections of our constitution above quoted, are violated by this act. It is a mistaken notion that the fourteenth article of amendment to the national constitution created any civil rights, or entitled citizens of states to transfer from the states to the federal government their security and protection. In a long series of decisions, beginning with the *Slaughterhouse Cases*, 16 Wall. 36, and among other great cases in *Patterson v. Kentucky*, 97 U. S. 501, *Butchers' Union Co. v. Crescent Co.*, 111 U. S. 746, 759, *Barbier v. Connolly*, 113 U. S. 27, *Yick Wo v. Hopkins*, 118 U. S. 356, *Powell v. Pennsylvania*, 127 U. S. 678, 683, and *Allgeyer v. State of Louisiana*, 165 U. S. 578, the supreme court of the United States has held, as well expressed by Mr. Miller, J., in the *Slaughterhouse Cases*, 16 Wall. 36: "The constitutional provision there alluded to did not create those rights, which it called privileges and immunities of citizens of the states. It threw around them in that clause no security for the citizen of the state in which they were claimed or exercised. Nor did it profess to control the power of the state governments over the rights of its own citizens. Its sole purpose was to declare to the several states that whatever those rights, as you grant and establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction."

And by Field, J., in *Barbier v. Connolly*, 113 U. S. 27: "Neither the amendment—broad and comprehensive as it ⁴³⁷ is—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity": See, also, *Yick Wo v. Hopkins*, 118 U. S. 365.

And so long as any state observes the requirements of the fourteenth amendment, and, in its legislation, gives to citizens of other states the same privileges and immunities that are enjoyed by its own citizens, and provides that no person shall be deprived of life, liberty, or property without due process of law, and affords to all persons within its jurisdiction the equal protection of its laws, the federal courts cannot inter-

fere therewith, even though the policy of the state be unwise, its laws arbitrary and oppressive and flagrantly in violation of the state constitution. And so it might well be that a law is valid so far as a clause of the federal constitution is concerned, and yet be expressly inhibited by the constitution of a state. It does not necessarily follow, therefore, that because an act has met the approval of the supreme court of the United States as not infringing any provision of the federal constitution, it is, for that reason, free from a prohibition contained in a state constitution. This distinction is not always observed, and some confusion exists on account of the loose talk about it. It should be said that counsel for respondent recognize it; nevertheless they would have us sustain this law on the authority of a decision which, when rightly considered under the facts of this case, is not an authority at all. In many of its own decisions, the supreme court of the United States has clearly indicated the extent and scope of its jurisdiction in cases like that before it in *Holden v. Hardy*, 169 U. S. 366. In *Barbier v. Connolly*, 113 U. S. 27, Mr. Justice Field, speaking for the court, said: "In this case we can only consider whether the fourth section of the ordinance of the city and county of San Francisco is in conflict with the constitution or laws of the United ⁴³⁸ States. We cannot pass upon the conformity of that section with the requirements of the constitution of the state. Our jurisdiction is confined to a consideration of the federal question involved."

And in *Yick Wo v. Hopkins*, 118 U. S. 356, Mr. Justice Matthews, speaking for the court, says: "The question whether his imprisonment is illegal, under the constitution and laws of the state, is not open to us. And although that question might have been considered in the circuit court in the application made to it, and by this court on appeal from its order, yet judicial propriety is best consulted by accepting the judgment of the state court upon the points involved in that inquiry."

In *People v. Budd*, 117 N. Y. 1, 15 Am. St. Rep. 460, we find both in the majority and dissenting opinions admirable statements of what consideration should be given by a state court to a decision of the supreme court of the United States on a question of constitutional law, where the point relates to the validity of a state statute claimed to be void, because it deprives a citizen of life, liberty, and property without due process of law; and the decision sustains the validity of the law.

Mr. Justice Andrews, speaking for the majority, thus states the rule: "Since the fourteenth amendment, the question whether a state statute infringes the constitutional guaranty protecting life, liberty, and property where it arises in a state court involves the consideration of both the federal and state constitutions, although the ground of construction and decision is identical under either instrument. But whether the decisions of the state court present a federal question reviewable on appeal to the supreme court of the United States depends on the nature of the decision of the state court; that is to say, whether it affirmed the validity of the statute or held it to be unconstitutional and void. If the state court decides that the statute does violate the constitutional guaranty, its decision is now, as before the fourteenth amendment, final and conclusive, and no appeal can be taken to the federal court, as in ⁴³⁹ that case no right under the constitution and laws of the United States has been denied. If, on the other hand, the state court sustains the statute and denies the right asserted, the federal jurisdiction attaches, and an appeal may be taken to the United States supreme court. It cannot be maintained, we think, that a decision of the federal court sustaining a state statute is *res adjudicata* and binding upon a state court, when the same question subsequently arises there under a similar statute. It would still be the duty of the state court to examine the question and decide it according to its interpretation of the constitutional guaranty."

Peckham, J., tersely, and to the same effect, on page 85, says: "In construing a clause in our state constitution similar to one in the federal instrument, should we follow the interpretation of such clause as given by the federal court, which interpretation compels us to deny to these defendants the relief they ask for, although otherwise we are satisfied that they are justly entitled to that relief?"

"If any right, privilege or immunity claimed under the federal constitution or laws be denied by this court, its decision is reviewable in the supreme court, and in such cases it is our duty to follow in the footsteps of that court and to be guided and controlled by its decisions. But in this case the right is claimed under our state constitution, and in matters pertaining to its proper construction our decision is final, excepting that if, as construed by us, the constitution or our laws deny the existence of some right or privilege claimed by a party by

virtue of the federal constitution or laws, our decision is reviewable by the federal court not for the purpose of reviewing our construction of our own constitution or laws, but to see whether, under the constitution or laws as construed by us, any right or privilege existing by virtue of the federal constitution or laws has been violated or denied, and, if so, to give effect, notwithstanding the state law or constitution. But where we deny no right or privilege claimed, ⁴⁴⁰ and, on the contrary, assert and protect it, there is no review by the federal court possible."

In *Indianapolis v. Navin*, 151 Ind. 139, the same rule is laid down, and numerous authorities are cited.

We have made these extracts from the authorities chiefly for the reason that they furnish a complete answer to the contention of respondent's counsel that the decision of the supreme court of the United States in the *Holden* cases is, in the circumstances here present, a binding authority, or any authority, upon this court. In all such questions, when it is once determined that no federal question is involved, that is the end of the inquiry by the federal court.

For the sake of brevity we desire in this connection (though the reference might be equally pertinent elsewhere) to notice what Mr. Justice Brown, who wrote the opinion of the majority, said of these decisions of the various state courts declaring unconstitutional eight-hour statutes: "We have no disposition to criticise the many authorities which hold that state statutes restricting the hours of labor are unconstitutional. Indeed, we are not called upon to express an opinion upon this subject. It is sufficient to say of them that they have no application to cases where the legislature had adjudged that a limitation is necessary for the preservation of the health of employes, and there are reasonable grounds for believing that such determination is supported by the facts."

The last sentence, removed from its proper setting, in its literal signification might seem to support respondent's contention that in exercising police power the legislature may override all constitutional limitations. If it be conceded, as it is not, that in the pending cause it was competent for that tribunal to make an announcement as to the power of the legislature in this connection that would bind the state courts, we think it clear that none such as is claimed here was made; for when this sentence is read, as it should be, with what immediately precedes and follows, it is not susceptible ⁴⁴¹ of the

interpretation put upon it. What follows is a declaration that, if the legislature has exercised a reasonable discretion, its act will be enforced, but if its action is a mere excuse for an unjust discrimination or the oppression of a particular class, it is a nullity. What precedes indicates, in the view of the court, that no criticism could be made upon the decisions of these state courts. These considerations, coupled with the closing words of the opinion, in which it is said that "the act in question was a valid exercise of the police power of the state," are persuasive that the learned justice intended his language to have only the scope to which language in an opinion must always be restricted, viz., the facts of the particular case, and that, therefore, this language, which would seem to be general in its application, was intended to be restricted to a case in which there was express constitutional authority as in Utah, for the enactment of legislation like that then, and now, challenged. But if we should be wrong in this construction, we must still for ourselves determine whether acts of our own legislature are, or are not, in contravention of our own constitution.

If the language used by that august tribunal in *Holden v. Hardy*, 169 U. S. 366, is to be understood as limiting or defining how far a state legislature may go in the exercise of the police power without transcending any of the limits prescribed by the federal constitution, we agree with counsel for petitioner that it was needful to the ascertainment of the question before the court. But if it is not to be thus restricted, and if it was employed with the view to determining what are the true limits of the police power of a state under its provisions of the constitution of that state, the remarks in that connection are wholly obiter and not authority in that court itself, much less in any other jurisdiction: *Wadsworth v. Union Pac. Ry. Co.*, 18 Colo. 600, 610, 36 Am. St. Rep. 309; *Carroll v. Carroll*, 16 How. 275, 287; 2 Black on Judgments, sec. 611.

In other words as to whether a given act of a state legislature does or does not violate the federal constitution, the decision of the supreme court of the United States is supreme,⁴⁴² to which all other tribunals must yield obedience. On the other hand, upon the question as to whether or not a state law is valid or invalid under a state constitution, the decision of the supreme court of that state is supreme and binding upon the federal as well as the state courts, with well-recognized

exceptions not applicable here, as illustrated in *Burgess v. Seligman*, 107 U. S. 20, 33.

In the light of these authorities it is clear: 1. That the decision of the supreme court of Utah in construing the Utah statute is not an authority here, for the reason that the decision there was based entirely upon the mandatory nature of a provision of the Utah constitution which is not present in our organic act; 2. In affirming the judgment of the Utah court, the decision of the supreme court of the United States in the *Holden* cases is not a precedent for this court in construing our act, for the reason that the sole question before the federal court was whether or not the Utah act violates the federal constitution. If, however, it could be maintained that this affirmation was, in effect, a determination that the Utah law was in harmony with the Utah constitution, the decision of the federal court would not be an authority here, because we have no such constitutional provision.

In *State v. Peel Splint Coal Co.*, 36 W. Va. 802, the court construed two acts, one prohibiting any corporation or person engaged in any business from paying its employes wages in anything but lawful money, the other providing that persons operating coal mines should weigh and measure coal at the place where mined, before the same is screened, the former being generally known as the scrip act, the latter as the coal screening act. Both were held constitutional.

It appears from the majority opinion that the decision as stated by the court was based upon two propositions: 1. That defendant was a corporation which, under the laws of West Virginia, enjoyed unusual and extraordinary privileges, which enabled it to surround itself with a vast retinue of laborers who needed to be protected against all fraudulent or suspicious devices in the weighing of coal or payment of ⁴⁴³ labor; 2. That the defendant, as a licensee, was pursuing a vocation which the state had taken under its general supervision for the purpose of securing the safety of employes by ventilation, inspection and governmental report; and the defendant therefore must submit to such regulations as the sovereign thinks conducive to the public health, morals or public security. Two of the four judges dissented, and in vigorous opinions, fortified by cogent reasoning, held both acts to be unconstitutional. Considering the grounds upon which the decision was based, it is so manifestly not against our conclusion, under the facts of this case, that we need not stop to analyze the opinion.

We now proceed with cases squarely condemning such enactments. In *Lowe v. Rees Printing Co.*, 41 Neb. 127, 43 Am. St. Rep. 670, an act providing that for all classes of mechanics, servants, and laborers, except those engaged in farm or domestic labor, a day's work shall not exceed eight hours, was held unconstitutional: 1. Because the discrimination against farm and domestic labors is a special legislation; and 2. Because, by the act in question the constitutional right of parties to contract with reference to compensation for services is denied.

In *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869, an act providing for the weighing of coal at the mines, and requiring owners of mines to furnish and place upon the railway track adjacent thereto a track scale of the standard measure, was held to be unconstitutional both upon the ground that it was class legislation, and that it prohibited persons sui juris from making their own contracts. The opinion of Mr. Justice Scholfeld is a very able and instructive one.

In *Frorer v. People*, 141 Ill. 171, an act directed against the truck system, which sought to prohibit persons engaged in the mining or manufacturing business from keeping a truck store was held to be unconstitutional on the ground that it was class legislation; and in discussing the limitations upon the police power, the following is pertinent: "And it can hardly be admissible that the legislative determination that the facts are such as to warrant this discrimination ^{and} is conclusive—for that would make the general assembly omnipotent—since, if that were so, there could be nothing but its own discretion to control its action in regard to every liberty enjoyed by the citizen": See, also, *Ramsey v. People*, 142 Ill. 380; *Braceville Coal Co. v. People*, 147 Ill. 66, 37 Am. St. Rep. 206; *Harding v. People*, 160 Ill. 459, 53 Am. St. Rep. 344.

In *Ritchie v. People*, 155 Ill. 98, 46 Am. St. Rep. 315, is an exhaustive discussion of the scope and limitations of this power. The act there construed provided that no female shall be employed in any factory or workshop more than eight hours in any one day, or forty-eight hours in any one week. In a lucid opinion by Mr. Justice Magruder this measure was held void as violating those clauses of the Illinois constitution against class legislation, and prohibiting the enactment of laws which deprive a person of life, liberty or property without due process of law. The reasoning of the opinion goes beyond anything we have said respecting these limitations. Though

many others equally pertinent might be made, we take the liberty of making therefrom the following extracts: "The legislature has no right to deprive one class of persons of privileges allowed to other persons under like conditions. The man who is forbidden to acquire and enjoy property in the same manner in which the rest of the community is permitted to acquire and enjoy it, is deprived of liberty in particulars of primary importance to his pursuit of happiness. If one man is denied the right to contract as he has hitherto done under the law, and as others are still allowed to do by the law, he is deprived of both liberty and property to the extent to which he is thus deprived of such right."

"But the police power of the state can only be permitted to limit or abridge such a fundamental right as the right to make contracts, when the exercise of such power is necessary to promote the health, comfort, welfare, or safety of society or the public; and it is questionable whether it can be exercised to prevent injury to the individual engaged in a particular calling."

⁴⁴⁵ In this connection may be cited a leading case in the court of appeals of New York, *In re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636, in which was nullified a pretended health law that sought to prohibit the manufacture of cigars and preparations of tobacco in any form in tenement houses, in certain cases. Mr. Justice Earle, in the course of the opinion, says: "To justify this law it would not be sufficient that the use of tobacco may be injurious to some persons, or that its manipulation may be injurious to those who are engaged in its preparation and manufacture; but it would have to be injurious to the public health."

Mr. Tiedeman, at section 86 of his work, says: "In so far as the employment of a certain class in a particular occupation may threaten or inflict damage upon the public or third persons, there can be no doubt as to the constitutionality of any statute which prohibits their prosecution of that trade. But it is questionable, except in the case of minors, whether the prohibition can rest upon the claim that the employment will prove hurtful to them. Minors are under the guardianship of the state, and their actions can be controlled so that they may not injure themselves. But when they have arrived at majority they pass out of the state of tutelage, and stand before the law free from all restraint, except that which may

be necessary to prevent the infliction by them of injury upon others. It may be, and probably is, permissible for the state to prohibit pregnant women from engaging in certain employments, which would be likely to prove injurious to the unborn child, but there can be no more justification for the prohibition of the prosecution of certain callings by women, because the employment will prove hurtful to themselves, than it would be for the state to prohibit men from working in the manufacture of white lead, because they are apt to contract lead poisoning, or to prohibit occupation in certain parts of iron smelting works, because the lives of the men so engaged are materially shortened."

And at section 178: "Laws, therefore, which are designed to regulate the terms ⁴⁴⁰ of hiring in strictly private employments are unconstitutional, because they operate as an interference with one's natural liberty, in a case in which there is no trespass upon private right, and no threatening injury to the public. And this conclusion not only applies to laws regulating the rate of wages of private workmen, but also any other law, whose object is to regulate any of the terms of hiring, such as the number of hours of labor per day, which the employer may demand. There can be no constitutional interference by the state in the private relation of master and servant except for the purpose of preventing frauds and trespasses."

Judge Cooley, in his standard work on Constitutional Limitations, fifth edition, at page 486, says: "If the legislature should undertake to provide that persons following some specified lawful trade or employment should not have capacity to make contracts, or to receive conveyances, or to build such houses as others were allowed to erect, or in any other way to make such use of their property as was permissible to others, it can scarcely be doubted that the act would transcend the due bounds of legislative power, even though no express constitutional provision could be pointed out with which it would come in conflict. To forbid to an individual or a class the right to the acquisition or enjoyment of property in such manner as should be permitted to the community at large, would be to deprive them of liberty in particulars of primary importance to their 'pursuit of happiness'; and those who should claim a right to do so ought to be able to show a specific authority therefore, instead of calling upon others to show how and where the authority is negatived."

And at page 745: "The general rule undoubtedly is, that any person is at liberty to pursue any lawful calling, and to do so in his own way, not encroaching upon the rights of others. This general right cannot be taken away. It is not competent, therefore, to forbid any person or class of persons, whether citizens ⁴⁴⁷ or resident aliens, offering their services in lawful business, or to subject others to penalties for employing them."

In his work on *Torta*, the same learned author, at page 326, remarks: "Every person *sui juris* has a right to make use of his labor in any lawful employment on his own behalf, or to hire it out in the service of others. This is one of the first and highest of civil rights."

And at page 337: "Every man controls his own property as he pleases, puts it to such use as he pleases, improves it or not, as he may choose, subject only to the obligation to perform, in respect to it, the duties he owes to the state and to his fellows. The state cannot substitute its judgment for his as to the use he should make of it for his own advantage."

In his work on *Constitutional Law*, at page 312, Mr. Black, in speaking of laws limiting the hours of labor, after stating that they might be held valid as to women and children, and as to occupations affected with a public interest, thus proceeds: "But where none of these circumstances apply, it is very doubtful whether such laws do not unwarrantably interfere with the right of contract."

Leep v. St. Louis etc. Ry. Co., 58 Ark. 407, 41 Am. St. Rep. 109, contains a valuable discussion of this subject, which is in line with our own decision; and in the course of the opinion it is said that *State v. Peel Splint Coal Co.*, 36 W. Va. 802, is against the weight of authority. At page 421 of the opinion, it is said: "We think it is obvious that the right to contract cannot be limited by arbitrary legislation which rests on no reason upon which it can be defended; for, if it could, the right would cease to exist, and become a license revocable at the will of the legislature, and the government would become a despotism in theory, if not in fact. Such a power cannot exist, for, if it could, it would be subversive of the right to enjoy and defend liberty, to acquire and possess property, and to pursue happiness declared to be inalienable by the constitution of this state."

448 "When the subject of contract is purely and exclusively private, unaffected by any public interest or duty to person, to society, or government, and the parties are capable of contracting, there is no condition existing upon which the legislature can interfere for the purpose of prohibiting the contract or controlling the terms thereof."

State v. Loomis, 115 Mo. 307, in discussing a scrip law, held that it was violative of the constitutional guaranty of due process of law, and void. Godcharles v. Wigeman, 113 Pa. St. 431, in passing upon the same sort of an act, held it unconstitutional as infringing the right of persons sui juris to make their own contracts. The supreme court of West Virginia, in State v. Goodwill, 33 W. Va. 179, 25 Am. St. Rep. 863, held a scrip law unconstitutional on the ground that it was class legislation. In People v. Budd, 117 N. Y. 1, 15 Am. St. Rep. 460, while the court held constitutional an act regulating elevator charges, on the ground that elevators were affected with a public interest and their owners had received special benefits from the state canal, yet the act itself was distinguished from one regulating a strictly private business. In respect thereto the court said: "That no general power resides in the legislature to regulate private business, prescribe the conditions under which it shall be conducted, fix the price of commodities or services, or interfere with freedom of contract, we cannot doubt. The merchant and manufacturer, the artisan and laborer, under our system of government, are left to pursue and provide for their own interests in their own way, untrammelled by burdensome and restrictive regulations which, however common in rude and irregular times, are inconsistent with constitutional liberty."

In the dissenting opinion of Peckham, J., now a member of the supreme court of the United States, is one of the most masterly discussions of the police power to be found in the books; and while it is a matter of regret that, in dissenting from the decision of the majority of the court in Holden v. Hardy, 169 U. S. 366, in which he was joined by Mr. Justice Brewer, he did not state anew the grounds thereof, yet a careful reading ⁴⁴⁹ of his dissenting opinion in the case to which we now refer discloses his objections to the doctrine announced in the Holden case; and prior decisions of Mr. Justice Brewer upon the same subject attest his reasons for such dissent.

The late case of People v. Warden, etc., 157 N. Y. 116, 68 Am. St. Rep. 763, holding invalid an act prohibiting all per-

sons except the agents of a transportation company from engaging in the passenger ticket brokerage business, is in line with the current of authority on the limitations of the police power.

State v. Julow, 129 Mo. 163, 50 Am. St. Rep. 443, condemns as void a law making it unlawful for an employer to prohibit an employé from joining, or to require an employé to withdraw from a trade or labor union, or other lawful organization, upon the ground that it is special legislation, and that it deprives the employé of property without due process of law. The following excerpt from the opinion places far greater restrictions upon the legislature in the exercise of the police power than it is necessary for us to do in the case at bar. After citing with approval the authorities which we have considered in this opinion, the court by Mr. Justice Sherwood, says: "Nor can the statute escape censure by assuming the label of a 'police regulation.' It has none of the elements or attributes which pertain to such a regulation, for it does not, in terms or by implication, promote, or tend to promote, the public health, welfare, comfort, or safety; and, if it did, the state would not be allowed, under the guise and pretense of police regulation, to encroach or trample upon any of the just rights of the citizen, which the constitution intended to secure against diminution or abridgment: In re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636, and cases cited."

Ex parte Kuback, 85 Cal. 274, 20 Am. St. Rep. 226, was a case in which was construed a municipal ordinance making it a misdemeanor for any person, when having labor performed for the purpose of carrying out a contract with the city, to demand, receive, or contract for more than eight ⁴⁵⁰ hours' labor in any one day from any person; and the same was held void as an infringement of the right of such persons to make and enforce their contracts; and could not be upheld as a sanitary or police regulation, as it might be if the employment was unfit for certain persons, as, for example, females or infants.

This summary review of the leading authorities shows clearly to our minds that the great weight of authority, as well as reason, supports the conclusion which we have reached. The result of our deliberation, therefore, is that this act is an unwarrantable interference with, and infringes, the right of both the employer and employé in making contracts relating

to a purely private business, in which no possible injury to the public can result; that it unjustly and arbitrarily singles out a class of persons and imposes upon them restrictions from which others similarly situated and substantially in the same condition, are exempt; and that it is not, under our constitution, a valid exercise of the police power of this state either in the subject selected or in the reasonableness of the regulation.

We cannot do better, in conclusion, than to quote from the opinion in the case of *Colon v. Lisk*, 153 N. Y. 188, 60 Am. St. Rep. 609, construing an act authorizing summary destruction, without a jury trial, of boats used by one person in interfering with oyster beds, etc., belonging to another, for, in one respect, it so fitly characterizes the act before us:

"It is to be observed that the statute does not relate to the health, morals, safety, or welfare of the public, but only to the private interests of a particular class of individuals. Nor can it be fairly said that the means provided for the protection of those interests are reasonably necessary to accomplish that purpose. But, on the contrary, they are plainly oppressive and amount to an unauthorized confiscation of private property for the mere protection of private rights. It is in no manner intended by this statute to protect any public interest, or defend any public right. Nor is it calculated to accomplish that ⁴⁵¹ end, but, under the guise of a pretended police regulation, it arbitrarily invades personal rights and private property. . . .

"It is manifest that this extraordinary and extreme statute is not necessary and was not intended for the protection of the public. Its sole purpose was to regulate private interests and enforce private rights. In no sense can it be regarded as a police law, and, consequently, is not within the police power. In this statute we have another example of class legislation where the legislature has attempted to improperly interfere with the private rights of the citizen. This species of legislation has been so often condemned by this and other courts as to render any further discussion of its impropriety and invalidity wholly unnecessary."

The petition, therefore, should be, and the same is hereby, granted, and the petitioner should be, and hereby is, discharged from custody.

CONSTITUTIONAL LAW—EIGHT-HOUR LAW.—Legislation which seeks to make eight hours constitute a day's work is not justified as a police regulation, for, under the pretense of exercising that power, the legislature cannot prohibit harmless acts not concerning the health, safety, or welfare of society, such as a contract fixing the time and compensation for services: *Low v. Rees Printing Co.*, 41 Neb. 127, 43 Am. St. Rep. 670.

CONSTITUTIONAL LAW—EIGHT-HOUR LAW.—A statute declaring that a day's work for all classes of mechanics, servants, and laborers, excepting those engaged in farm or domestic labor, shall not exceed eight hours, and that for working any employe over the prescribed time the employer shall pay extra compensation in increasing geometrical progression for the excess over eight hours, is unconstitutional, as being special legislation, and as denying the constitutional right of parties to contract with reference to compensation for services: *Low v. Rees Printing Co.*, 41 Neb. 127, 43 Am. St. Rep. 670.

CASES
IN THE
SUPREME COURT
OF
CONNECTICUT.

COUGHLIN v. McELROY.

[72 Connecticut, 99.]

ELECTIONS—BALLOTS—DISTINGUISHING MARKS.—Under a statute providing that no ballot shall be counted containing any mark or device whereby it may be identified as to who might have cast it, and also providing that any voter may alter or change his ballot by erasing any name therefrom, or by inserting in its place, in writing or by paster, the name of any person other than the candidate named, the alteration of a ballot by erasing the name on a paster and restoring the name originally printed on the ballot, either by writing or by another paster, does not render the ballot void.

ELECTIONS — BALLOTS — DISTINGUISHING MARKS. — Marks upon the face of ballots which appear or are shown to have been made accidentally, and not for the purpose of indicating the voter, and changes for the existence of which a reasonable explanation consistent with honesty and good faith, either appears upon the face of the ballot or is shown by proof, do not render the ballot void as containing distinguishing marks.

ELECTIONS — BALLOTS — AMBIGUITY — EVIDENCE.—If there is no ambiguity upon the face of a ballot, the fact that it was intended to be cast for another person cannot be shown by extrinsic evidence.

D. Davenport, for the appellant.

A. B. Beers and G. P. Carroll, for the appellee.

¹⁰³ **HALL, J.** The petitioner was a candidate upon the Democratic and the respondent upon the Republican ticket for the office of collector of the city of Bridgeport, at the town and city election held on the first Monday of April, 1899. The respondent was declared elected by the presiding officer of the meeting. Upon the petitioner's application to a judge

of the superior court for a recount of the ballots, under section 58 of the General Statutes, it was found that the respondent had received five thousand and fifty-three and the petitioner five thousand and thirty-one votes, and that the respondent was therefore elected by a plurality of twenty-two.

In reaching this result, thirty-eight ballots cast for the petitioner were held by the trial judge to be void under the provisions of the election law (Pub. Acts 1897, c. 213, p. 911), ¹⁰⁴ and were not counted. There were also eleven ballots cast for Joseph P. Coughlin which were not counted for the petitioner. The rulings of the judge of the superior court, that said thirty-eight and said eleven ballots could not lawfully be counted for the petitioner, present the only questions raised by the appeal to this court.

Upon one of said thirty-eight ballots the respondent's name, which had been pasted over the petitioner's, originally printed on the ballot, had been erased with ink or pencil, and the petitioner's name written at the right and opposite the paster. Upon the remaining thirty-seven the petitioner's name had been pasted over his own name, originally printed on the ballots, with, in some cases, intermediate McElroy pasters; in others intermediate pasters or parts of pasters the names upon which could not be determined; and in others indications that an intermediate paster had been removed.

These thirty-eight ballots should have been counted for the petitioner, unless they came within the prohibition of either section 9 or section 12 of the act of 1897. Section 9 provides that "if any envelope or ballot shall contain any mark or device so that the same may be identified in such a manner as to indicate who might have cast the same, the ballot so marked, the ballot with the paster so marked, or the ballot contained in any envelope so marked, shall not be counted." Section 12 is as follows: "All ballots cast in violation of the foregoing provisions, or which do not conform to the foregoing requirements, shall be void and not counted; provided, however, that any voter may alter or change his ballot by erasing any name or names therefrom, or by inserting in place of any name or names thereon, in writing, or by a paster, the name of any person, for any office to be voted for thereon, other than the person thereon named for such office." Section 1 describes the essential requisites of a legal ballot. The manner in which ballots are to be cast is provided in sections 3 to 7 inclusive, and in section 9.

The thirty-eight ballots in question possessed all the requirements described in section 1. The manner in which they were cast was not in violation of any of the provisions preceding section 12. If ¹⁰⁵ they are void ballots, they have become so by changes which are prohibited, either by the proviso of section 12 concerning the inserting of other names by writing or paster, or by the provisions of section 9 concerning distinguishing marks.

The only alterations made were by erasing names, or by inserting names either in writing or by paster. Section 12 permits ballots to be changed by either of these methods. The erasure was of a name not originally printed upon the ballot. The name inserted by writing or paster was in each instance that of the person named on the original ballot for the office of collector. Section 12 neither expressly permits nor expressly prohibits the erasure of a name not originally printed upon a ballot, nor the insertion by writing or paster of a name which was originally printed upon the ballot. It expressly permits the erasure of those names only which were originally printed upon the ballot, and the insertion by writing or paster of names which were not so printed upon the ballot.

A statute may be so construed as to give a negative force to affirmative words, and as impliedly prohibiting other acts than those expressly permitted. But in the absence of words directly prohibiting the changes made on those ballots, that construction of the language of the proviso of section 12 should be favored which, without defeating the purposes of the secret ballot law or in any way impairing its effective force, does not deprive the electors of their votes honestly cast for the candidate of their choice. This makes it best subserve its purpose—that of supporting the privileges of free suffrage: Const., art. 6, sec. 6. The changes made in these ballots did not render them void because of any express or implied prohibition contained in section 12.

This conclusion is somewhat at variance with a dictum at the close of the majority opinion in the case of Talcott v. Philbrick, 59 Conn. 472, 480, where, in speaking of the effect of the proviso in section 12 of the act of 1889, the language of which is practically identical with that of the same section in the law of 1897, it is said: "No other erasure or writing is allowed; all else must be printed. If any other writing is allowed, other provisions of the statute are rendered

nugatory ¹⁰⁶ and meaningless. Expressing in terms what may be done prohibits the doing of anything else." But the question of the construction to be placed upon the provisions of section 12 was directly involved in the quo warranto cases of Phelan v. Walsh and Sanger v. Henry, 62 Conn. 269. Among the ballots claimed to be void in those cases were certain ones originally printed without the name of any candidate for judge of probate, and upon which a name for judge of probate had been inserted by writing or by printed paster. As the ballot as originally printed contained no name for the office of judge of probate, the name inserted by writing or paster was not that of a person other than the one named on the ballot for such office. This court, in those cases, held that these were neither void ballots because not in conformity with the requirements of section 1, nor rendered void by the alteration of inserting the name of a candidate by writing or paster. Concerning the absence of the name of a candidate upon the ticket, the court said (page 294): "To hold that such an omission as this makes it void would be to extend the statute somewhat beyond the letter and clearly beyond its spirit, which is hardly allowable in a statute penal in its nature." With reference to the filling in of the blank space with the name of a candidate, by writing or paster, the court said (page 294): "It was done under that part of the twelfth section allowing a voter to erase, interline, and use a paster. That section was designed to alleviate the otherwise rigid features of the statute and is remedial. As such it should receive a liberal construction. Hence, if a man may erase and insert, he may procure others to do it for him, or he may adopt the act of others after it has been done. If he may erase and insert, he may fill a blank. These are all acts of the same nature as the acts which the statute expressly permits. Hence, they are within the spirit of the statute. A construction which would limit this section to the thing expressed would be unusual and we think unwarrantable."

In the same cases the validity of two hundred and eighty-seven ballots was questioned which were cast in the town of Litchfield for Robert E. DeForest, the Democratic candidate for Congress. Upon all ¹⁰⁷ these ballots the name of the candidate was originally printed in capital letters, excepting that a small "e" was used in the first syllable of the word DeForest. Upon two hundred and forty-seven of these ballots, over the name thus printed, were pasters upon which

was printed the name ROBERT E. DEFOREST, all in capital letters. Both of these classes of ballots were held to be valid and properly counted. The court said (page 296): "The ballot as first printed was a substantial compliance with the statute, and the amendment, though unnecessary, was fairly justified by the twelfth section."

We have, then, in these cases, an express decision that a ballot is not necessarily rendered void by placing over a name, originally printed thereon, the same name printed upon a paster. From the reasoning by which that decision was reached, it clearly follows that neither the erasure of a name from a paster, nor the insertion by writing of the name originally printed upon the ticket, necessarily renders the ballot void.

Whether the thirty-eight ballots under consideration were rendered invalid by the alterations thus made must be determined by reference to the provisions of section 9 concerning marked ballots, rather than by those of section 12. The mere fact that alterations made upon the face of ballots might constitute distinguishing marks within the prohibition of section 9, does not render them void under that section. Even those changes which are expressly permitted by section 12, may be used to indicate the voter. Changes which are allowed by section 12 will never invalidate a ballot unless it appears that they were made for corrupt purposes. Changes which are not within the provisions of section 12 render the ballot void as having a distinguishing mark forbidden by section 9, unless a reasonable explanation "is or may be suggested for their existence consistent with honesty and good faith." Marks upon the face of ballots which appear or are shown to have been made accidentally, and not for the purpose of indicating the voter, and changes for the existence of which a reasonable explanation consistent with honesty and good faith either appears upon the face of the ballot or is shown by proof, do not render the ballots void under the provisions of section 9: *Phelan v. Walsh*, etc., 62 Conn. 260.

¹⁰⁸ The trial judge not only does not find that the changes in question were made for the purpose of indicating who might have cast the ballots upon which they appeared, but has found that a reasonable explanation for the action of these voters in inserting the petitioner's name by writing or paster upon a ballot upon which his name was originally printed, and in erasing a name from a paster, is furnished by the fact that

the respondent caused to be sent to every supposed Democratic voter of Bridgeport a regular set of Democratic tickets, excepting that his (McElroy's) name had been pasted over that of the petitioner's for the office of collector. In so doing no deception was attempted to be practiced by the respondent, as each voter was duly informed by an inclosed circular of the change so made. But the result was, as the court has in effect found, that voters who received and used these ballots and who desired to vote for Mr. Coughlin, either attempted to remove the McElroy paster and, failing to wholly remove it, placed a Coughlin paster over the remnant, or, without attempting to remove the McElroy paster either placed a Coughlin paster over it, or—supposing from the statement of the circular that they were so doing—in fact placed the Coughlin paster immediately over Coughlin's name. The finding shows that the voters acted honestly in making these changes. The trial judge rightly held that they were not made in violation of the provisions of section 9.

The ruling that the eleven ballots upon which were pasted the name of Joseph P. Coughlin for collector could not be counted for the petitioner was correct. Those who cast these ballots may have intended to vote for Patrick Coughlin. They in fact voted for another person who resided in Bridgeport, was eligible to the office of collector, and was a candidate for selectman upon the Democratic ticket. There is no ambiguity upon the face of these ballots, and the fact, if it be so, that they were intended to be cast for another person cannot be shown by extrinsic evidence: *McCrary on Elections*, sec. 507.

The trial judge erred in not counting for the petitioner the thirty-eight ballots described in paragraph 14 of the finding. The petitioner was elected to the office of collector, and a certificate ¹⁰⁹ to that effect should have been issued by the judge, as provided by statute.

There is error and the judgment is reversed.

In this opinion the other judges concurred.

ELECTIONS.—A MARK ON A BALLOT, which satisfactorily appears to have been made inadvertently or accidentally and not for an evil purpose, is not within the meaning of a statute requiring the exclusion from the count of all ballots having thereon marks not authorized by law, and should not be construed as an identifying or distinguishing mark: *Dennis v. Coughlin*, 22 Nev. 447, 58 Am. St. Rep. 761. See the monographic note to *Taylor v. Bleakley*, 49 Am. St. Rep. 240-249, on this subject.

ELECTIONS.—PLACING PASTERS on ballots over the name of a candidate as originally printed, in order to correct a supposed error in the printing, does not invalidate the ballots: See the extended note to *Taylor v. Bleakley*, 49 Am. St. Rep. 247.

ELECTIONS.—BALLOTS ARE THE BEST EVIDENCE in an election contest of how the electors voted: *Tebbe v. Smith*, 108 Cal. 101, 49 Am. St. Rep. 68. A perfect ballot is exclusive evidence of a voter's intent: *Wimmer v. Eaton*, 72 Iowa, 374, 2 Am. St. Rep. 250. See also, *State v. Steinborn*, 92 Wis. 605, 53 Am. St. Rep. 938.

HIGGINS v. RUSSO.

[72 Connecticut, 238.]

ATTACHMENT—WRONGFUL—ATTORNEY'S LIABILITY. If an attorney places a writ in the hands of an officer, with directions to attach certain specific property, with knowledge that the title to such property is in dispute, and after receiving from his client a sum of money to enforce his claim and to reimburse the officer for any loss he might sustain from the attachment, the attorney is to be regarded as personally requesting the service and personally liable to reimburse the officer if the levy turns out to be wrongful. The fact that the officer, acting in good faith while making the attachment, was shown a bill of sale of the property to a third person, by another than the plaintiff in attachment, and that he failed to inform the attorney of the name of the vendor in such bill of sale, does not preclude his recovery.

L. N. Blydenburgh, for the appellant.

W. B. Stoddard and R. C. Stoddard, for the appellee.

²⁴¹ **HALL, J.** The trial court rendered judgment against the defendant for the amount which the plaintiff had been required to pay to satisfy a judgment against him for having, as a deputy sheriff, attached certain goods under a writ placed in his hands for service by the defendant as an attorney at law.

²⁴² This judgment is claimed to be erroneous upon three grounds: 1. That the defendant, being an attorney at law, and known by the plaintiff to have been acting as such, did not, by delivering to him as an officer a writ of attachment with directions to take particular goods as the property of the debtor, become thereby liable to reimburse him for loss sustained because the goods so attached were the property of another; 2. That upon the facts found there was no promise to indemnify the officer; 3. That by his misconduct or

negligence in failing to give to the attorney certain information which the officer had gained concerning the title to the goods attached, he forfeited his right to be reimbursed for the amount so paid by him.

In the case of *Heath v. Bates*, 49 Conn. 342, 345, 44 Am. Rep. 234, this court said: "The rule seems a reasonable one, and the only reasonable one, that an attorney placing a writ in an officer's hands for service, is to be regarded as personally requesting the service and as personally liable for it, unless he expressly informs him that he will not be personally liable, or there are circumstances which make it clear that that was the understanding of the parties."

In the case at bar, the attorney knew before employing the officer that the goods, afterward attached as the property of the defendant named in the writ, were claimed by his brother, who subsequently proved his title to them. He expected that the question of the ownership of the property taken would be contested, and had received from his clients a sum to be used to enforce their claim and to reimburse the officer for any loss he might sustain by attaching these goods. The officer was not referred to the attorney's clients, nor did he know them. He received all his instructions from the defendant, and was by him expressly directed to take this particular property and to hold it. Under the circumstances, the attorney is justly regarded as having personally requested the services rendered, and as having personally directed the plaintiff to take the property attached. He is, therefore, personally liable for the consequences of his acts, one of which is the legal inference from these facts of a promise to reimburse ²⁴² the officer for any loss suffered by having taken the property of the wrong person.

"The law, however, implies a promise of indemnity, on the part of the creditor, where he directs the officer to make a levy on any particular property": 1 *Swift's Digest*, *542. "Where one employs another to do acts not unlawful in their nature, or on the face of them, for the purpose of asserting a right, the law implies a promise of indemnity. Where a creditor in an execution directs the officer to levy it on certain property shown to him, claiming it to belong to the debtor, if the property should prove to belong to some other person, and the officer should be subjected to pay for it in an action brought against him by the owner, he would have a claim of

indemnity against the creditor": 1 Swift's Digest, *414; Stoyel v. Cady, 4 Day, 222, 226; Nash v. Smith, 6 Conn. 421, 426; Marcy v. Crawford, 16 Conn. 549, 553, 41 Am. Dec. 158.

The failure of the officer to inform the defendant of the names of the grantors in the bill of sale shown him does not affect the plaintiff's right of action nor the defendant's liability. The officer attempted to conceal nothing. It was reasonable for him to suppose that the defendant knew the grounds upon which the debtor's brother claimed title to the goods attached. The defendant could have learned by whom the bill of sale was given by inquiring of the vendee's attorney Mr. Pond, or of the plaintiff.

It was not error to render judgment for the full amount paid by the plaintiff upon the execution against him. The defendant does not appear to have claimed, either in his answer or upon the trial, that he should be credited with the sixty-five dollars and seventy cents, the avails of the sale of the attached goods made by plaintiff upon his advice. That sum does not greatly exceed the amount admitted by defendant's answer to be due the plaintiff as officer's fees, which amount was not included in the plaintiff's judgment.

There is no error.

In this opinion the other judges concurred.

ON WRONGFUL ATTACHMENT, see the monographic notes to Tisdale v. Major, 68 Am. St. Rep. 286-280; Burton v. Knapp, 81 Am. Dec. 467-480.

WRITS—ATTORNEY'S LIABILITY FOR SERVICE OF.—In Heath v. Bates, 49 Conn. 342, 44 Am. Rep. 234, it is said that an attorney placing a writ in the hands of an officer for service is to be regarded as personally requesting the service and as personally liable for it, in the absence of an understanding to the contrary.

ANDERSON v. COWLES.

[72 Connecticut, 335.]

SEARCH WARRANTS—RETURN OF.—TO JUSTIFY ACTS done under a search warrant, it must be returned to court; otherwise the acts become trespasses ab initio.

LIBEL—PRIVILEGED COMMUNICATION.—In an action for libel the defendant may, under a general denial, avail himself of the defense that the article complained of is a privileged communication.

EVIDENCE RAISING COLLATERAL ISSUES.—In an action to recover for maliciously procuring a search warrant, evidence by the defendant that he had been informed by a third person that the latter was in the company of plaintiff when he stole defendant's property, is not admissible to show reasonable cause for procuring such warrant. Such evidence would raise collateral issues not in the case.

Action to recover for maliciously causing a search warrant to be issued, under which plaintiff's premises were entered and searched, and also to recover for a libel consisting in the complaint upon which such warrant was procured, and the warrant itself. Judgment for plaintiff and the defendant appealed.

A. L. Shipman, for the appellant.

C. G. Root, for the appellee.

335 ANDREWS, C. J. The court charged the jury that the warrant, which was made a part of the complaint, did not furnish any justification for the acts complained of. This was correct. The warrant had never been returned. The officer omitted to return it by the direction of the defendant. For this reason the acts done became a trespass ab initio: *Dehm v. Hinman*, 56 Conn. 320, 322; *Williams v. Ives*, 25 Conn. 568; *Pratt v. Pond*, 45 Conn. 386; *Toby v. Reed*, 9 Conn. 216; *Wright v. Marvin*, 59 Vt. 437; *Monroe v. Merrill*, 6 Gray, 238; *Buller's Nisi Prius*, 23. "If a sheriff have not returned a writ which ought to have been returned, he becomes, although this be only a nonfeasance, a trespasser ab initio, as to everything which has been done under the writ": 6 *Bacon's Abridgment*, Trespass, B.

The warrant being void for this reason, there is no occasion to discuss whether or not it was void for the reason that it was not signed by the justice to whom the complaint was made.

The complaint alleged that the libelous writing had been published to Henry G. Scott and Frank O. Peck, citizens of Watertown. On the trial it appeared that Scott was a deputy sheriff and Peck a constable, and that they had the warrant for service. Thereupon the defendant claimed and asked the court to rule that as to these persons the complaint and warrant was a privileged communication. The court refused so to rule, on the ground that the defendant could not avail himself of a privileged communication, as it was ³³⁹ not pleaded. This was error: *Atwater v. Morning News Co.*, 67 Conn. 504, 510.

For the purpose of showing that he had reasonable cause for making the complaint, the defendant testified that before he made it he had been told by one Patterson that he, Patterson, was in company with Anderson when Anderson stole the things named in the complaint. He then sought to show by the testimony of other persons that they had lost articles of property, and that Patterson had told them that he had been in company with Anderson when Anderson had stolen such articles. Upon objection this evidence was rejected by the court. This was correct. The evidence would have raised issues not proper in this case.

The plaintiff introduced Wallace Hayes as a witness, who testified that he asked the said Patterson "why he made those statements to Cowles [the defendant] about John Anderson, and that Patterson replied that he made them because Cowles offered ten dollars." This evidence was objected to, but the court admitted it. The testimony was apparently offered to repel the defendant's claim that he had acted in good faith in making the complaint, and to show that he had no reason to believe the statements of Patterson to be true. The plaintiff sought to show that Patterson made the statements about Anderson to obtain the ten dollars, rather than because the statements were true. In such case the defendant could not have relied upon them when he made the complaint. Granting that, to show Patterson's motive, his own declarations were the best evidence, still there was no evidence tending to show that the defendant was aware that Patterson was acting from such motive; and without bringing the knowledge of Patterson's motive home to the defendant, his good faith in making the complaint could not be affected. We think this testimony of Mr. Hayes was inadmissible.

There is error, and a new trial must be granted.

In this opinion the other judges concurred.

SEARCH WARRANT.—NO RETURN IS REQUIRED upon a search warrant if the goods are not found: *Chipman v. Bates*, 15 Vt. 51, 40 Am. Dec. 663.

MALICIOUS PROSECUTION—EVIDENCE.—One charged with malicious prosecution should not be permitted to prove that he had been told by others that the accused was guilty: See the extended note to *Ross v. Hixon*, 28 Am. St. Rep. 160.

JUDD v. HARTFORD.

[72 Connecticut, 350.]

MUNICIPAL CORPORATIONS ARE PERSONS IN LAW, capable of inflicting injuries, and liable to suit by him who suffers them, unless they flow from and are incidental to, the performance of governmental duty.

MUNICIPAL CORPORATIONS.—MUNICIPAL DUTIES ARE GOVERNMENTAL when imposed by the state for the benefit of the general public, and municipal immunity does not reach beyond such governmental duties.

MUNICIPAL CORPORATIONS—NEGLIGENCE—SETTING BACK SEWAGE.—A municipal corporation is liable for injury to property arising from the setting back of sewage during a severe, but not extraordinary, storm, when such injury is due to the negligence of the city in failing to remove temporary obstructions from a sewer after the completion of its construction or alteration.

MUNICIPAL CORPORATIONS—JUDGMENT AGAINST—DEFENSE OF WANT OF FUNDS.—A municipal corporation cannot avoid a judgment for a common-law liability by pleading that it has no money on hand out of which it can be paid.

Action to recover damages for an injury claimed to have been caused by defendant's negligence in stopping up the outlet to a sewer, whereby sewage was set back in the basement of plaintiff's storehouse. Judgment for plaintiff, and defendant appealed.

W. J. McConville, for the appellant.

A. L. Shipman, for the appellees.

³⁵³ **BALDWIN, J.** The city was held liable to the plaintiffs, not because it planned and constructed an inadequate sewer, but because, after planning and constructing an adequate sewer, it left obstructions in it, placed there for tempo-

rary purposes, which its agents carelessly omitted to remove, after those purposes had been accomplished.

For negligence in such matters a municipal corporation cannot escape responsibility on account of its public character. It is a person in law, capable of inflicting injuries, and liable to suit by him who suffers them, unless they flow from or are incident to the performance of a governmental duty. Municipal duties are governmental when they are imposed by the state for the benefit of the general public. They may sometimes have that character, also, when imposed in pursuance of a general policy, manifested by legislation affecting similar corporations, for the particular advantage of the inhabitants of the municipality, and only through this, and indirectly, for the benefit of the people at large: *Jewett v. New Haven*, 38 Conn. 368, 9 Am. Rep. 382. Whether an instance of this nature is furnished by the provisions of the defendant's charter respecting the construction and maintenance of sewers, it is unnecessary to inquire. The injury to the plaintiffs was due to no fault of plan or construction, and to no omission to make proper repairs. It was of the same nature as one that might be suffered by the occupant of a new ²⁵⁴ house who strikes his foot in a dark passage against an ax or stumbles over a heap of shavings which the builder's workmen have carelessly left upon the floor. The failure to sweep out the shavings or pick up the tools is something distinct from the work of building the house. It could only occur after the building was finished. So, even if the charter duty of the defendant as to the construction or alteration of the sewer with which the plaintiffs' store was connected was governmental, its duty, after that had been performed, to clean up, and remove any temporary appliances which, if left where they were, would render the sewer unserviceable or inadequate, was a new and ministerial one. It was a simple and definite duty arising under fixed conditions, and implied by law: *State v. Staub*, 61 Conn. 553, 568. No one else could perform it. The sewer was part of the defendant's property and under its exclusive control. Its functions in regard to its construction or reconstruction had been discharged; the occasion for an exercise of those as to its repair had not arrived; and if its agents had before been acting as agents of the law, they now acted, or neglected to act, as its proper servants, subject to the full application of the rule of respondeat superior: *Norwalk Gaslight Co. v. Norwalk*, 63

Conn. 495, 530. "Municipal immunity does not reach beyond governmental duty": *Weed v. Greenwich*, 45 Conn. 170, 183. Had the city authorities expressly directed the workmen employed upon the sewer not to remove the "center" or the sand-bags, when to allow them to remain was to turn this piece of city property into a nuisance to those who had paid for the right to share in its use, and were dependent upon its efficiency for the enjoyment of the houses and stores which it was built to serve, an action could certainly have been maintained for any resulting injury: *Mootry v. Danbury*, 45 Conn. 550, 556, 29 Am. Rep. 703; *Hoyt v. Danbury*, 69 Conn. 341, 351; *Morgan v. Danbury*, 67 Conn. 484, 496. It lies equally in the absence of such directions. The cause of action is the failure to remove the obstructions. Whether this was an intentional or an unintentional omission of duty is immaterial.

³⁵⁵ Nor is it of any consequence that the city, in altering its sewerage system, was relying upon funds derived from bonds issued under an amendment to its charter (11 Special Laws, p. 429), which provided that the sums thus borrowed should be used for such alterations or for purchase of real estate for parks, "and for no other purposes whatever." It cannot avoid a judgment for a common-law liability by pleading that it has no money on hand out of which it can be paid.

That the storm which was the immediate occasion of the flooding of the plaintiffs' cellar was a severe one can constitute no defense. It was severe but not extraordinary: *Diamond Match Co. v. New Haven*, 55 Conn. 510, 526, 3 Am. St. Rep. 70.

There is no error.

In this opinion the other judges concurred.

MUNICIPAL CORPORATIONS—GOVERNMENTAL ACTION.—

A municipal corporation is not answerable in damages to one who is injured by its taking, or neglecting to take, strictly governmental action: *Bartlett v. Clarksburg*, 45 W. Va. 393, 72 Am. St. Rep. 817. A power of a municipality which has relation to public purposes and is for the public good is governmental: *Springfield etc. Ins. Co. v. Keeseville*, 148 N. Y. 46, 51 Am. St. Rep. 667. See, too, *Platt v. Waterbury*, 72 Conn. 531, post, p. 335.

MUNICIPAL CORPORATIONS—PRIVATE OBLIGATIONS.—A municipality, with respect to the private character of its powers and obligations, is subject to the same rule of liability as an individual is: *New Orleans v. Kerr*, 50 La. Ann. 413, 69 Am. St. Rep. 442; *Potter v. New Whatcom*, 20 Wash. 589, 72 Am. St. Rep. 135; *Esberg Cigar Co. v. Portland*, 84 Or. 282, 75 Am. St. Rep. 651.

MUNICIPAL CORPORATIONS—DEFECTIVE SEWERS.—For not keeping sewers in repair after they have been constructed a city is answerable to an individual injured thereby: *Chicago v. Seben*, 165 Ill. 371, 56 Am. St. Rep. 245; *Brunswick v. Tucker*, 103 Ga. 235, 68 Am. St. Rep. 92; monographic note to *Chalkley v. Richmond*, 29 Am. St. Rep. 740-743.

LAPENTA v. LETTIERI.

[72 Connecticut, 377.]

PARTNERSHIP FOR FIXED TERM—POWER OF PARTNER TO DISSOLVE.—A partnership is, in its essence, a contract of agency based upon the assent of each of the partners, which may be retracted at any time as to future dealings by a termination of the partnership at the will of either partner, although the term of such partnership may not have expired.

WITNESSES ATTESTING—NOTICE OF CONTENTS OF WRITING.—The fact that a person signed a paper as an attesting witness does not, as matter of law, imply knowledge on his part of the contents thereof.

PARTNERSHIP—DISSOLUTION—DUTY OF EACH PARTNER.—The voluntary dissolution of a partnership leaves each of the partners charged with the duty of administering the partnership assets, so far as he may have them in his possession or under his control, in such manner as to protect the partnership creditors.

MECHANICS' LIENS—NOTICE TO OWNER.—If an original contractor takes a partner in the contract before the commencement of the work, and such partnership is not recognized nor assented to by the owner of the building erected under such contract, a certificate of lien filed in the name of both partners, more than sixty days after the commencement of the work, is of no validity under a statute providing that no person other than the original contractor, or a subcontractor whose contract has been assented to by the owner of the building, shall be entitled to claim any lien, unless he shall, within sixty days from the time he commences work, give written notice to the owner of an intention to claim a lien.

INTERPLEADER—WHO ENTITLED TO.—In case of a controversy between an original contractor and his partner and such contractor's assignee, respecting a balance due on the building contract, the owner of the premises is entitled to maintain a bill of interpleader against all of the parties, requiring them to interplead concerning their respective claims to such fund.

Suit for an injunction and an order of interpleader in respect to the title to a balance due upon a building contract. Judgment awarding the fund to defendant Conti, and appeal by defendant Aspromonte.

A. J. Broughel, Jr., for the appellant.

J. P. Tuttle and H. A. Ross, for the appellee.

²⁸² **BALDWIN, J.** As between Lettieri and Aspromonte, all rights of Lettieri by reason of his contract with the plaintiff became vested in a partnership consisting of Lettieri and Aspromonte, before any work under the contract was done; and it was this partnership by which the erection of the buildings was not only commenced, but completed, unless it was dissolved by the action of Lettieri in rescinding the articles of partnership without Aspromonte's consent.

²⁸³ A copartnership is in its essence a contract of agency. Each partner is the general agent of the firm, and the firm is the agent of each partner, with power to bind him to a personal liability in favor of partnership creditors. Whoever acts as another's agent must base his authority on the other's assent. Such assent, if given, may be retracted at any time, as regards future transactions. This doctrine in the law of agency rest on reasons which apply fully to the partnership relation. It is one especially of personal confidence, and when this is wanting can seldom be long maintained with advantage to any party in interest. The rule of Roman law, *Tam diu societas durat, quam diu consensus partium integer perseveret* (Code of Justinian, IV, tit. 37, pro socio, 5), has accordingly been generally followed in American courts, and seems the only one consistent with the general principles of contract: See *Skinner v. Dayton*, 19 Johns. 513, 538, 10 Am. Dec. 286; *Karrick v. Hannaman*, 168 U. S. 328, 334; 3 Kent's Commentaries, *55; *Solomon v. Kirkwood*, 55 Mich. 256.

The rescission, therefore, of the agreement between Lettieri and Aspromonte by Lettieri after due notice to Aspromonte, terminated their partnership relation before the building was finished.

This agreement was not in the form of an assignment, and, had it been, as no notice of its terms, so far as appears, was given to the plaintiff, it would have been insufficient to make him accountable to the copartnership. His signature as an attesting witness did not, as matter of law, imply any knowledge on his part of the contents of the paper. Nor did his acceptance of receipts for moneys paid, signed by both Lettieri and Aspromonte, necessarily show that he knew them to be copartners and dealt with them as such. So far as he was concerned, therefore, his legal obligations were to Lettieri alone.

The dissolution of the partnership left Lettieri and Aspromonte each charged with the duty of administering the partnership assets, so far as he might have them in his possession or under his control, in such a manner as to protect the partnership creditors: *Rice v. McMartin*, 39 Conn. 573, 575; ³⁸⁴ *New Haven County Bank v. Mitchell*, 15 Conn. 206, 222. It was for the advantage of each and both that the building contract should be fulfilled, and each continued to contribute to that end. When the buildings were completed, Lettieri properly filed the certificate of lien in his own name, for he was the only party to whom the plaintiff was legally liable; but Aspromonte had an equitable interest in the estate in the land which was thus created, as well as in the indebtedness which it secured.

To hold the plaintiff to the payment of the contract price, it was necessary for Lettieri and Aspromonte to raise six hundred dollars to meet claims for work and materials. Aspromonte having declined or being unable to contribute anything for this purpose, Lettieri dissolved the partnership, and afterward borrowed the money from Conti, on assignments of his rights under the contract with the plaintiff and of his builder's lien. This loan was for the benefit both of Lettieri and Aspromonte, and Lettieri was, therefore, not only legally but equitably entitled to secure it as he did. Conti was chargeable with notice of the certificate of lien filed by Aspromonte in favor of the partnership on January 28, 1898, but as that date was more than sixty days after the commencement of the work, and the partnership was neither the original contractor with the plaintiff nor a subcontractor acquiring rights with the plaintiff's written assent, this certificate was of no validity: *Gen. Stats.*, sec. 3020.

After the assignment to Conti to secure the six hundred dollar loan, he assumed the payment of a bill of one hundred and fifty dollars for materials used in the construction of the buildings, and supplied Lettieri with some goods for his personal use, whereupon Lettieri made a further assignment to him of all his remaining rights under the contract. So far as these goods are concerned, Conti cannot claim the benefit either of the contract or of the builder's lien, as against Aspromonte. His transaction with Lettieri, in this particular, amounted at most, when examined in a court of equity, to

buying property held in cotenancy from one of the cotenants. He could buy no greater title than Lettieri had.

²³³ As respects the plaintiff, his legal indebtedness to Lettieri had become an indebtedness to Conti, and his buildings were encumbered in favor of the latter only. He was under no obligation to withhold payment until the equities between Lettieri and Aspromonte or between Aspromonte and Conti had been adjusted. The circumstances were such, however, as to justify him in instituting this proceeding; and having asked in his complaint that Lettieri, Aspromonte and Conti be ordered to interplead together concerning their claims to the fund, he opened the door to a full inquiry into any and all such demands as either might present: *Union Trust Co. v. Stamford Trust Co.*, 72 Conn. 86, 93.

The claims of the parties were sufficient to raise all the material issues which it was necessary to determine in order to do full justice between them, without resort to any cross-complaint or further pleadings.

Conti was entitled, as against Lettieri, to the whole of the fund in controversy, but as against Aspromonte to so much only as would repay the six hundred dollars borrowed by Lettieri and indemnify him for the assumption of the one hundred and fifty dollar bill.

Aspromonte had a right to ask the court to state the partnership account between himself and Lettieri, so far as might be necessary to determine his equitable share in whatever balance might remain after satisfying Conti's demand to the extent above stated, and then to order the payment to him of the amount of that share, if any, by the plaintiff.

The fourth and fifth of the final rulings of the trial court were therefore incorrect. They were founded on too technical a view of the forms of procedure upon proceedings of this nature.

There is error, the judgment is set aside, and the cause remanded for further hearing as to the state of the partnership account, and a judgment ascertaining and enforcing the respective rights of Conti and Aspromonte in the fund, in conformity with this opinion.

In this opinion the other judges concurred.

Partnership for Definite Period—Power of Partner to Dissolve.*

Upon the question how far the status or relation of a partnership, which by the partnership agreement is to continue for a certain number of years, or for a definite period, can be determined by one partner, without the consent of the other, before the expiration of that time, there has been some difference of opinion. No doubt the weight of authority, as well as the better reasoning, is in favor of the rule that any partner may dissolve such a partnership at will. In an early New York case, the right of a partner to dissolve the partnership, it is said, "is a right inseparably incident to every partnership. There can be no such thing as an indissoluble partnership. Every partner has an indefeasible right to dissolve the partnership as to all future contracts by publishing his own volition to that effect, and after such publication the other members of the firm have no capacity to bind him by any contract. Even where partners covenant with each other that the partnership shall continue for seven years, either partner may dissolve it the next day by proclaiming his determination for that purpose, the only consequence being that he thereby subjects himself to a claim for damages for a breach of his covenant. The power given by one partner to another to make joint contracts for them both is not only a revocable power, but a man can do no act to divest himself of the capacity to revoke it": *Skinner v. Dayton*, 19 Johns. 513-539, 10 Am. Dec. 286. This language is quoted, adopted, and followed in *Solomon v. Kirkwood*, 55 Mich. 256-259. In *Karrick v. Hannaman*, 168 U. S. 328-335, Mr. Justice Gray, in delivering the opinion of the court, said: "No partnership can efficiently or beneficially carry on its business without the mutual confidence and co-operation of all the partners. Even when, by the partnership articles, they have covenanted with each other that the partnership shall continue for a certain period, the partnership may be dissolved at any time, at the will of any partner, so far as to put an end to the partnership relation and to the authority of each partner to act for all, but rendering the partner who breaks his covenant liable to an action at law for damages, as in other cases of breaches of contract. The only difference, so far as concerns the right of dissolution by one partner, between a partnership for an indefinite period and one for a specified term, is this: In the former case the dissolution is no breach of the partnership agreement, and affords the other partner no ground of complaint. In the latter case such a dissolution before the expiration of the time stipulated is a breach of the agreement, and as such to be compensated in damages. But in either case the action of one partner does actually dissolve the partnership." If a partnership is formed to con-

***REFERENCE TO MONOGRAPHIC NOTES.**

Partnership—Dissolution—Rights, liabilities, and remedies of partners after: 60 Am. St. Rep. 561-576.

Partnership—Dissolution—Sufficient cause for: 60 Am. St. Rep. 410-436.

time for a definite period, one partner may at any time withdraw and cause a technical dissolution of the firm, subject to liability to his partners if his act is wrongful: *Mason v. Connell*, 1 Whart. 381; *Slemmer's Appeal*, 58 Pa. St. 168, 98 Am. Dec. 255; *Green v. Waco State Bank*, 78 Tex. 2; *Swift v. Ward*, 80 Iowa, 700; *Blake v. Dorgan*, 1 G. Greene, 537; *Cape Sable Co.'s Case*, 3 Bland, 606; *Monroe v. Connor*, 15 Me. 178, 32 Am. Dec. 148. A partnership for a definite term, which has not expired, can be put an end to by the voluntary assignment by one of the partners of his interest in the business at his own instance, or at the instance of his assignee, against the will of the other partner: *Westbrook v. Wheeler*, 25 Ont. 559; *Miller v. Brigham*, 50 Cal. 615; *Monroe v. Hamilton*, 60 Ala. 227. The assignment by one of such partners of all of his interest in the partnership and its property to trustees for the payment of debts operates, ipso facto, as a dissolution of the partnership, and such dissolution revokes the authority of one partner to bind the partnership in reference to any new contract except in settling and paying the debts of the concern: *Conrad v. Buck*, 21 W. Va. 397; *Marquand v. New York Mfg. Co.*, 17 Johns. 525. Some consideration is due those cases which maintain the contrary doctrine. Thus, in *Henn v. Walsh*, 2 Edw. Ch. 129, it was said that "a partnership agreement, like any other, is binding upon the parties. They must adhere to its terms. Neither partner is at liberty to recede from it against the will of the other without a sufficient cause. Mere dissatisfaction by one partner does not justify him in filing a bill for a dissolution where, by the express agreement, it is to continue for a definite term, and the court will not interfere to dissolve the contract upon such ground." Similar views are expressed in the following cases: *Howell v. Harvey*, 5 Ark. 270, 39 Am. Dec. 376; *Berry v. Foulkes*, 60 Miss. 576; *Van Kuren v. Trenton etc. Mfg. Co.*, 13 N. J. Eq. 306. Where the articles of copartnership prescribe a specified period for its continuance, no one of the partners can, by purely voluntary acts done by him, work its dissolution. This cannot be done by his voluntary assignment of his share and interest in the partnership: *Ferrero v. Buhlmeier*, 34 How. Pr. 33; *Pearpoint v. Graham*, 4 Wash. C. C. 232; *Cole v. Molley*, 12 W. Va. 730; *Cash v. Earnshaw*, 66 Ill. 402. Such partnership continues until it expires by limitation, and the partner who thus seeks to dissolve it must still account for one-half the profits accruing therefrom: *Cole v. Molley*, 12 W. Va. 730. On the authority of the above cases it was held in *Hannaman v. Karrick*, 9 Utah, 236, that where one partner forcibly expels the other and takes forcible possession of the partnership effects and wholly excludes the other partner for a period prior to the expiration fixed by the partnership agreement, such acts do not effect a dissolution of the partnership, but an action for an accounting lies for the effects and profits for such period of exclusion. This case

of *Hannaman v. Karrick*, 9 Utah, 236, was reversed on appeal to the supreme court of the United States: *Karrick v. Hannaman*, 168 U. S. 328. In *Gerard v. Gateau*, 84 Ill. 121-125, 25 Am. Rep. 438, the court said that "a party who is the author of the ill-feeling between himself and his partners ought not to be permitted to make the relation he has induced the ground of a dissolution of the partnership. His conduct may have been taken with a view to that very result, and it would be inequitable to allow him advantage from his own wrongful acts. It would allow one partner, at his election, to put an end to his own deliberate contract, when the other had been gully of no wrongful act or omission of duty. The results flowing from the premature dissolution of a partnership might be most disastrous to a partner who had embarked his capital in the enterprise." A court of equity may, at the instance of one partner, for sufficient cause dissolve a partnership before the expiration of the term for which it was entered into. It is sufficient cause for dissolution that it clearly appears that all confidence between the partners has been destroyed, or that the business for which the firm was formed is impracticable or cannot be carried on except at a loss: *Sieghortner v. Weissenborn*, 20 N. J. Eq. 172; *Bishop v. Breckles*, Hoff. Ch. 534.

McKELVEY v. CREEVEY.

[72 Connecticut, 464.]

MORTGAGES—RIGHT TO SEVERED FIXTURES.—A mortgagee not in possession cannot maintain an action of replevin against a bona fide purchaser of a fixture severed from the mortgaged premises and sold by the mortgagor while in possession.

J. C. Chamberlain and E. O. Hull, for the appellant.

W. H. Comley, Jr., for the appellee.

⁴⁰⁸ **TORRANCE, J.** In the court below and in the argument before this court the case proceeded upon the assumption that the furnace in question was conveyed by the mortgage as a part of the real estate, by way of fixture, and for the purposes of the argument we adopt this assumption.

Upon the facts found the furnace must be regarded as having been severed from the realty by the mortgagor in possession before foreclosure, and as having been afterward sold by her to the defendant, who bought with constructive notice of

the mortgage, but otherwise in good faith and for value. The question presented upon the record is whether a fixture so severed and sold can be recovered by the mortgagee from such purchaser in an action of replevin.

This question is to be determined by our own law in relation to the respective rights of mortgagor and mortgagee in the land. In this state, as in many of our sister states, "the law of mortgages has been built up on a series of legal fictions. These have been created from time to time as a convenient means of defining and regulating the various estates to which conveyances may give rise": *Ensign v. Batterson*, 68 Conn. 298, 309. Some of these fictions, at first devised and applied in courts of equity, have for years past been recognized also by courts of law: *Porter v. Seeley*, 13 Conn. 564, 573. In form, and in legal theory, under our law, a mortgage in fee is a conveyance of the fee to the mortgagee. It is an estate in the land upon condition, to become absolute upon nonperformance of the condition. The mortgagee is owner of the land, while the mortgagor has no legal estate therein until he performs the condition. If he fails to do so, all his right to the land is gone. In substance and effect, however, and except for a very limited purpose, the mortgage is regarded as mere security for the performance of the duty described in the mortgage deed; and the mortgagor is ⁴⁶⁷ for most purposes regarded as the sole owner of the land, "as well after forfeiture as before the execution of the deed; and the mortgagee has rather a power than an interest, the use of which is strictly limited to the collection of the debt, or enforcement of the duty, which the mortgage was intended to secure": *Porter v. Seeley*, 13 Conn. 564, 573.

In this view of the matter the "equity of redemption" is regarded as the land, and its owner as the owner of the land, for most purposes; while the "estate in fee" of the mortgagee is, except for a limited purpose, regarded as personal estate and mere security: *Waterbury Sav. Bank v. Lawler*, 46 Conn. 243, 245; *Downing v. Sullivan*, 64 Conn. 1, 3. In accordance with this view, it has been held in the following cases that the estate of the mortgagor is subject to dower, descends to heirs, may be attached and set off on execution, may as real estate confer rights of settlement, is devisable and taxable as real estate, and is based upon a title sufficient to maintain ejectment; while to the estate of the mortgagee none of these inci-

dents attach, save the right to maintain ejectment: *Fish v. Fish*, 1 Conn. 559; *Barkhamsted v. Farmington*, 2 Conn. 600, 605; *Huntington v. Smith*, 4 Conn. 235; *Roath v. Smith*, 5 Conn. 133; *Swift v. Edson*, 5 Conn. 531; *Savage v. Dooley*, 28 Conn. 411, 73 Am. Dec. 680.

As between mortgagor and mortgagee, however, it is the law of this state that the latter is regarded as having the legal title to the land: 2 *Swift's Digest*, 1st ed., 166; *Wakeman v. Banks*, 2 Conn. 445; *Smith v. Vincent*, 15 Conn. 1, 38 Am. Dec. 52; *Downing v. Sullivan*, 64 Conn. 1; but he is so regarded, as appears by the cases cited, only to a limited extent and for a limited purpose. He is regarded as having the legal title, and therefore as legal owner, mainly for the purpose of obtaining by ejectment or otherwise possession of the land, and holding it, in order to make his security available in payment of his debt. To that end, in the absence of any agreement to the contrary, he may take possession when he pleases, when he can do so peaceably, and may bring his action of ejectment when he will, without previous notice or demand, and recover the land with all the crops thereon: ⁴⁶⁸ 2 *Swift's Digest*, 1st ed., 166. He has title and ownership enough to make his security available, but for substantially all other purposes he is not regarded as owner, but the mortgagor is so regarded, always subject, of course, to the mortgage.

It is upon this fact—that by our law the mortgagee is owner of the land for certain purposes—that the plaintiff in the present case bases her right to the severed fixture. She says that it was hers while it was attached to the land, and that she did not lose her title to it by severance. Now it is true, with regard to fixtures which the owner in fee alone has the right to sever, that they belong to him when severed. The severance, although it changes the legal character of the thing from realty to personalty, does not change the ownership. The ownership of severed fixtures is one of the incidents of such an ownership of realty, and in case of a wrongful severance and removal, such owner can follow the fixture and reclaim it, or recover damages for its loss, by the ordinary remedies given by law to the owner of personal property: *Riley v. Boston Water Power Co.*, 11 Cush. 11; *Moody v. Whitney*, 34 Me. 563; *Johnson v. Elwood*, 53 N. Y. 431. The question, then, is whether this incident attaches, under our law, to the estate of the mortgagee out of possession. Is he the owner of a severed

chattel as against the mortgagor in possession? Upon such a question it is quite conceivable that different courts would take, and in fact they have taken, opposite views.

In most, perhaps in all, of the other New England states, and in some others, the courts have held in effect that the mortgagee out of possession is owner of the severed chattel, and may reclaim it, or recover for its loss, from a purchaser from the mortgagor in possession, when the purchase was made under circumstances like those in the case at bar: *Mosher v. Vehue*, 77 Me. 169; *Langdon v. Paul*, 22 Vt. 205; *Sanders v. Reed*, 12 N. H. 558; *Waterman v. Matteson*, 4 R. I. 539, 544; *Southbridge Sav. Bank v. Mason*, 147 Mass. 500. In New Jersey, it has been held that such mortgagee could not maintain replevin for a fixture (a steam-engine) ⁴⁶⁹ severed and removed from the premises by the mortgagor or his assign: *Kircher v. Schalk*, 39 N. J. L. 335.

In our own state, in *Cooper v. Davis*, 15 Conn. 556, it was in effect decided that the mortgagee out of possession could not maintain an action of trover for a fixture severed and sold by the mortgagor in possession. In that case the fixtures were severed and sold after a decree of foreclosure and a judgment and execution in ejectment had been obtained by the mortgagee, but before the day fixed for redemption; and in the opinion it is hinted that they were severed and sold with the design, on the part of the mortgagors, of impairing the security. That case in effect holds that the incident of ownership of severed fixtures, under circumstances similar to those existing in the case at bar, is one that attaches to the estate of the mortgagor in possession before foreclosure, and not to the estate of the mortgagee. The case was ably argued by eminent counsel, it was carefully considered, and was decided, all the judges concurring, upon the single point that the mortgagee was not the owner of the severed fixture as against a purchaser from the mortgagor in possession. This decision was made in 1843 and has never been overruled, nor has its validity been successfully called in question since. Indeed, the principle underlying *Cooper v. Davis*, 15 Conn. 556, was in effect applied by this court in 1877 in the case of *Whiting v. New Haven*, 45 Conn. 303, where it was held that the mortgagor in possession, rather than the mortgagee, was entitled to the compensation provided for part of the mortgaged property taken under the right of eminent domain; although in some other jurisdictions the decisions are the other way: *Keller v. Bading*, 169 Ill. 152, 61

Am. St. Rep. 159; *Sherwood v. Lafayette*, 109 Ind. 411, 58 Am. Rep. 414. While that case stands, it is decisive of the present case in favor of the defendant; for if, under the circumstances, the mortgagee cannot, for want of title, recover from the purchaser the value of the fixture as damages, neither can he maintain an action of replevin against such purchaser; because under that decision such mortgagee, as against such purchaser, has neither ⁴⁷⁰ property in the fixture nor a right to its immediate possession, nor is it wrongfully detained from him.

The plaintiff claims, in effect, that *Cooper v. Davis*, 15 Conn. 556, should be overruled, because the doctrine of that case is: 1. Inconsistent with the view held in this state that a mortgage in fee conveys an estate in fee; and 2. It operates harshly and even unjustly against the mortgagee.

As to the claimed inconsistency, that is, perhaps, true, but it is at most a technical rather than a real one, and our law relating to mortgages is full of such inconsistencies. The doctrine that severed and removed fixtures belong to the mortgagor rather than to the mortgagee is no more inconsistent with our theory of the estates of each than is our doctrine that dower and most of the other incidents of legal estates attach to the estate of the mortgagor and not to that of the mortgagee.

With regard to the other claim of the plaintiff, it may be true that the rule adopted in *Cooper v. Davis*, 15 Conn. 556, operates harshly at times against the mortgagee; but the question is whether the opposite rule would not operate still more harshly and unjustly as against the mortgagor in possession, and purchasers from him. The real interest of the mortgagee in the land is measured by the amount of his debt and not by his deed. If the severance of a fixture does not, in fact, diminish his security, if after it is severed, as before, his security is ample, there exists no good reason why he should be held to be the owner of the severed fixture. He can prevent by injunction waste that would really diminish his security; he can take possession of the land at once or obtain it by the aid of a court of law, and can hold it till his debt is paid. In addition to this, he is protected by a criminal statute against waste done with intent to defraud him, or with intent to lessen the value of the property: Gen. Stats., sec. 1445. The evils and inconveniences which the plaintiff claims inevitably follow from the adoption of the rule applied in *Cooper v. Davis*, 15 Conn. 556,

have not heretofore been seriously felt in this state, nor do we think they will be in the future.

On the other hand, the adoption of the opposite rule would ⁴⁷¹ work serious inconvenience and annoyance to mortgagors in possession and those dealing with them. It would, in effect, make the mortgagor in possession liable to an action at law for waste, while under our law heretofore he has not been regarded as liable at law for waste: 1 Swift's Digest, 1st ed., 166; and it would limit very materially the power, hitherto exercised by mortgagors in possession, of dealing with the land as their own, in reference to removal of fixtures and the commission of acts of technical waste.

This view of the matter is very well expressed in the opinion in the New Jersey case of *Kircher v. Schalk*, 39 N. J. L. 339, as follows: "Mortgagors in possession of estates subject to mortgages past due are constantly, for purposes of repair or profit, detaching and removing buildings, fixtures, fences, trees, and other similar articles, without intending to impair, or, in fact, impairing the substantial rights of the mortgagees. If, for every removal, the occupants and those into whose possession the detached articles come, are liable to trover or replevin, at the instance of parties whose real rights have not been infringed, the privileges of land owners are less than they are generally esteemed, and less than they need be for purposes of justice."

On the whole we are of the opinion that the rule adopted in *Cooper v. Davis*, 15 Conn. 556, is, in view of our doctrine as to mortgages, founded in good sense and upon solid reasons, and should be applied in cases like the one at bar.

It may be that the mortgagee could recover damages for the intentional removal of fixtures whereby the value of the security is impaired to his detriment, but that question is not before us here and is not decided.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

FIXTURES.—A MORTGAGEE MAY REPLEVY fixtures wrongfully detached and taken from the mortgaged property, if the mortgage vests him with the legal title or with the right of immediate possession: Note to *Lavenson v. Standard Soap Co.*, 13 Am. St. Rep. 153, 154. See, too, *Philadelphia etc. Co. v. Miller*, 20 Wash. 607, 72 Am. St. Rep. 138.

ROMEO v. MARTUCCL

[72 Connecticut, 504.]

SALES BY CONSIGNEE, WHEN VOID.—If a consignee of goods, in violation of the contract of consignment and out of the usual course of business, transfers to another, the consignor is entitled to retake his property, notwithstanding it may have been so transferred to an innocent purchaser for value.

SALES—CONSIGNMENT OF GOODS ON COMMISSION—RIGHT OF CONSIGNOR TO RETAKE.—Under a contract of consignment of goods for sale on commission, the consignor is not estopped from setting up his title as against an innocent purchaser of the goods from the consignee, when such purchaser buys them on the same day that they are received as part of his purchase of the entire stock of goods and business of the consignee.

R. H. Tyner, for the appellant.

J. E. O'Connor, for the appellee.

See HAMERSLEY, J. The finding is in some respects strongly suggestive of bad faith on the part of the defendant; but as the court, notwithstanding the suggestive appearances, finds that the defendant paid a reasonable price after inquiry and without notice of defect in title, he must be treated as an innocent purchaser for value.

We have, then, these facts: Ricciardelli and Brother, retail grocers in New Haven, agreed to sell on commission for the plaintiff, a wholesale grocer in New York, a quantity of groceries valued at five hundred and fifty-nine dollars. The goods were received on consignment at New Haven on January 20th, and the same day the Ricciardellis, for the lump price of nine hundred and sixty-five dollars, sold their grocery store, stock (including the plaintiff's property), fixtures, household furniture, and goodwill of business, to the defendant, a purveyor of contract laborers in New York, and then disappeared without accounting to the plaintiff. This action was brought the next day.

There is no doubt as to the relation between the plaintiff and the Ricciardellis; it is that of principal and factor, a relation long regarded as beneficial in the transaction of business, and one whose legal effect has been defined by numerous decisions: *Lawrence v. Stonington Bank*, 6 Conn. 521, 527. The property consigned is bailed, and remains in the ownership of the consignor until disposed of by the consignee in pursuance of the agency established by the fact of the consignment. If the consignee, in violation of the consignment and out of the usual

course of business, transfer to another, the consignor is entitled to retake his property, notwithstanding it may have been so transferred to an innocent purchaser for value. This principle is too thoroughly established to permit of argument. The transfer by the Ricciardellis was in plain violation of the consignment; no serious claim to the contrary is made or can be maintained.

The only real question is whether the plaintiff has done ⁵⁰⁰ anything which estops him from setting up his right as consignor. If by his voluntary action he clothed the Ricciardellis with an appearance of ownership beyond that involved in the ordinary contract of consignment, and the defendant was thereby deceived to his damage, he is estopped from denying the authority thus evidenced by his acts. This principle is rooted in justice and has been applied to a great variety of conditions. Such action by the owner of property may furnish evidence of fraud, and the question of estoppel is sometimes confused with that of fraudulent transfer. Possession may be evidence of fraud when it conceals the usual evidence of a change of title. This applies especially to the mortgage or pledge of personal property where the mortgagor is presumed to remain owner of the property unless there is a change of possession. But it is different where property known to belong to one man comes into the possession of another; in such case it becomes a matter of inquiry whether he has borrowed it, or hired it, or purchased it; and this ought to be ascertained by him who proposes to trust his property upon the faith of this appearance: *Forbes v. Marsh*, 15 Conn. 384, 397. Accordingly, cases of conditional sale made bona fide have been held good; and in the modern and somewhat perilous enlargement of such sales, the fact of actual intent and good faith is made the test of the transaction: *Lewis v. McCabe*, 49 Conn. 141, 155, 44 Am. Rep. 217; *Mack v. Story*, 57 Conn. 407, 413.

But here there is no question as to the nature of the transaction; it is the ordinary contract of consignment. There is no question of fraud on the part of the owner; the good faith of his conduct is neither directly nor indirectly impugned. The sole claim is that he has "voluntarily permitted another to hold himself out to the world as being the true owner, and for this purpose intrusted him with the exclusive possession or other indicia of title, under circumstances which would naturally tend to mislead." The cases where the real owner has been estopped by having clothed the possessor with indicia of

title for such purposes and under such circumstances, are many; but "all these cases proceed upon the ground that the owner has deliberately assumed a false position, and a ⁵¹⁰ character inconsistent with that of owner, which, if changed, would result in fraud and damage." They have no application to a case where the acts of the owner are confined to those incident to a legitimate bailment or consignment. "Every borrower or bailee for hire uses the thing bailed, in many respects, as his own; and his conduct, to some extent, furnishes a false index of property; but yet, the legal powers and duties of bailee being entirely consistent with the true position and character of the owner, the rights of the bailor will be protected against the abuse of the bailee's powers, though he were to sell the property bailed to a bona fide purchaser": *Baldwin v. Porter*, 12 Conn. 473, 482, 483. A consignee differs from an ordinary bailee, mainly in that he is authorized to sell in the ordinary course of business; but if he sell out of the ordinary course of business he abuses his powers, and against this abuse the consignor is protected like any other bailor.

When a mortgagee leaves the property mortgaged in the possession of the mortgagor, possession under such circumstances may be treated as an index of title; it is inconsistent with the real transaction which demands a change of possession, and the mortgagee deliberately puts himself in a false position. But in the case of a consignment, the reverse is true. Possession by the consignee is consistent with the transaction, and is evidence of the authority pertaining to that transaction, but furnishes no other index of title as against the consignor. Some act of the consignor inconsistent with the true relation is necessary for that purpose; as if the bill for goods consigned were made out as one for goods sold, or a bill of lading were given which treats the consignee as owner or purchaser. In such way the consignor may put himself in a false position, so that, if the rights of an innocent purchaser intervene, he cannot change that position without fraud and damage. There may be other acts by which a consignor may be estopped from asserting his title, but they must be equivalent in force to the ones indicated.

In the present case, it does not appear whether the goods consigned and received on the day of the sale had been unpacked ⁵¹¹ when the defendant first examined the stock; it is immaterial, except as bearing on the good faith of the defendant; but if he had then asked for some evidence of ownership,

he could only have been shown a bill for goods consigned, and the real character of the Ricciardellis' possession would have been apparent. The defendant chose to rely on the authority of the possessors to sell in their retail business indicated only by the possession described. He would have been protected in a purchase within the scope of such authority, which was real as well as apparent. But the selling out of the whole business was not within the scope of that authority. It does not necessarily follow that a retail dealer, authorized in the ordinary course of business to sell the articles on his shelves, is therefore the owner of the whole business and every article in his possession. If he attempts to sell his business and stock as a single chattel, he enters upon an outside and independent transaction; the purchaser cannot retain, as against the real owner, portions of that stock held under consignment, unless the owner has clothed the consignee with some index of ownership beyond that incident to the fact of a consignment. Where a principal with full knowledge permits his factor "to transact the ordinary business of a merchant in his own name, he would even then be bound by his acts only so far as they were within the ordinary mode of transacting that particular branch of business, provided there were no circumstances tending to show that he permitted him to use his own name with a view of imposing upon others": *Potter v. Dennison*, 10 Ill. 590, 598.

The plaintiff has done nothing to mislead, unless every consignment is misleading. He gave the Ricciardellis possession, but it was the possession of consignees only. He knew that the goods were to be sold by the consignees in their retail store in connection with their other stock, and that the goods were to be sold at retail in the name of the consignees; but these are the ordinary incidents of a consignment to a retail merchant: *Ex parte Dixon*, L. R. 4 Ch. Div. 133, 136, 137; *Slack v. Tucker*, 23 Wall. 321, 330; *Potter v. Dennison*, 10 Ill. 598.

⁵¹² The conduct of the plaintiff amounts to a consignment of his goods for sale in the ordinary course of business, and nothing more. His title cannot be defeated by any disposition of his property not within the agency established by such consignment. A consignee cannot transfer the property in payment of his own debt: *Benny v. Pegram*, 18 Mo. 191, 59 Am. Dec. 298. He must sell in the market where he transacts busi-

ness: *Wootters v. Kaufman*, 73 Tex. 395, 399; *Catlin v. Bell*, 4 Camp. 183; *Marr v. Barrett*, 41 Me. 403. He cannot sell by way of barter: *Guerreiro v. Peile*, 3 Barn. & Ald. 616, 618. He cannot pledge the goods consigned: *Paterson v. Tash*, *Strange*, 1178; *Kuckein v. Wilson*, 4 Barn. & Ald. 443, 447; *Kelly v. Smith*, 1 Blatchf. 290, 293; *Gray v. Agnew*, 95 Ill. 315. To turn over the goods consigned to another by a sale of his business and stock in trade is as distinctly a disposition foreign to the consignment and for the benefit of the consignee, as a pledge, or sale in payment of consignee's debt, or a barter. "By the general rule, a factor cannot bind the principal by a disposition of his property out of the ordinary course of business": *Commercial Nat. Bank v. Heilbronner*, 108 N. Y. 439, 444; *Warner v. Martin*, 11 How. 209, 224.

We are asked to treat the ordinary incidents of a bona fide consignment as sufficient indicia of title to enable the consignee to bind his principal by every act of ownership, as against an innocent third party. This would involve the reversal of the whole line of cases by which the contract of consignment has been recognized and defined.

The court erred in overruling the claim of the plaintiff that upon the special facts found the goods in question were still the property of the plaintiff, and that he is entitled to the immediate possession thereof.

There is error, the judgment of the court of common pleas is reversed, and the cause remanded for further proceedings according to law.

In this opinion the other judges concurred, except Andrews, C. J., and Hall, J., who dissented.

MR. CHIEF JUSTICE ANDREWS and Mr. Justice Hall dissented, the latter saying that: "In the present case a small retail grocery business was carried on by two brothers at an established place of business, under their own name of Ricciardelli and Brother. There was nothing to indicate that they did a commission business, or that they had goods in their store which did not belong to them, or that they acted as agents for anyone. On the contrary, by carrying on the business in their own names, in the manner in which such a business is ordinarily conducted, they held themselves out to the world, not only by selling the goods in their store as their own, but by the various ways in which the proprietorship of such a business is advertised, as the owners of the business and of the stock in trade in their store. With full knowledge of these facts, the plaintiff shipped to them a quantity

of groceries to be placed by them in their store as part of the stock of their said business, and to be sold by them in their said business at retail in the same manner that they sold their own goods in their retail business. The authority thus conferred included, and doubtless contemplated, the right of Ricciardelli and Brother, not alone to sell the goods at retail, but in the general conduct of their retail business to hold themselves out as both having the right to sell, and as having the full title to, these goods as a part of their entire stock. The right of ownership and the right to sell are, of course, to be distinguished, but in the conduct of their retail business Ricciardelli and Brother properly represented themselves as possessing both. If they were authorized, in the conduct of their retail business, to hold themselves out to the public as being the owners of their stock in trade, they were clothed with the power to lead people to believe that they had such a title as would enable them to sell the entire stock at one time. The defendant evidently purchased the goods, not in reliance upon an apparent right of Ricciardelli and Brother to sell at retail, but upon the indicia of ownership with which they were clothed by the plaintiff. The defendant visited the store and examined it, and inquired about the business and its proprietors. He learned nothing to indicate that it was a commission or agency business, but everything to indicate that it was a retail grocery business, carried on in the ordinary manner; and that Ricciardelli and Brother were the proprietors and owners of the business and stock.

"I am of the opinion that the facts found show that the plaintiff voluntarily clothed his agents with the indicia of a full title to the goods in question; that the defendant had reasonable ground to believe that Ricciardelli and Brother were the owners of the goods; that the plaintiff is estopped from denying the authority of his agents to sell to the defendant, and therefore that there was no error in the judgment of the court of common pleas."

Judge Hall also said: "The authorities upon this subject are numerous. In the often cited case of *Pickering v. Busk*, 15 East, 37, the action was trover, and it appeared that one who was both a broker and also engaged in the hemp trade purchased for the plaintiff, a merchant, a quantity of hemp which at the plaintiff's request was delivered to the broker, and upon the wharfinger's books was transferred from the name of the seller to that of the broker. The latter, without actual authority to sell, sold the hemp to the defendant's assignors for value. Lord Ellenborough, C. J., said: 'I cannot subscribe to the doctrine that a broker's engagements are necessarily, and in all cases, limited to his actual authority. . . . It is clear that he may bind his principal within the limits of the authority with which he has been apparently clothed by the principal in respect to the subject matter. . . . The sale was made by a person who had all the indicia of property.'

"This court said in *Baldwin v. Porter*, 12 Conn. 473, 482: 'It is a general principle that no man can sell property or transfer title to that which he does not own; nor can one man's property, without his consent, be rendered subject to the demands of another. To this rule there are exceptions; but they are such as become necessary to protect innocent persons against fraud. . . . Therefore, it has been holden that if the owner of goods voluntarily permit another to hold himself out to the world as being the true owner, and for this purpose intrust him with the exclusive possession or other indicia of title, under circumstances which would naturally tend to mislead, he shall be concluded by the sale of it to an innocent and mistaken purchaser.'

"*Nixon v. Brown*, 57 N. H. 84, was an action of trover. An agent with the plaintiff's money purchased a horse for him, taking, without authority, a bill of sale in his own name. With knowledge of the facts, the plaintiff permitted him to go away with the horse and bill of sale. The agent having sold the horse to the defendant, who purchased for cash and without notice of the agency, absconded. In sustaining the title of the defendant, Smith, J., said: 'When the purchaser knows he is dealing with an agent, it is his duty to inquire into the nature and extent of the authority conferred by the principal, and to deal with the agent accordingly. But when the agency is not known, and the principal has clothed the agent with powers calculated to induce innocent third persons to believe that the agent owned the property, or had power to sell, the principal is bound, and strangers will not suffer.'

"The case of *Heath v. Stoddard*, 91 Me. 499, decided in 1898, was an action of replevin by the owner of a piano who had intrusted it with one Spencer, who was a dealer in pianos, to take it and leave it at the defendant's house, but without authority to sell it; the plaintiff himself to go there in a day or two and sell it if he could. The plaintiff had a verdict. We quote from the opinion of the supreme court sustaining defendant's exception to the charge of the trial judge: 'A principal is not only bound by the acts of his agent, whether general or special, within the authority which he has actually given him, but he is also bound by his agent's acts within the apparent authority which the principal himself knowingly permits his agent to assume, or which he holds the agent out to the world as possessing. . . . Whether or not a principal is bound by the acts of his agent, when dealing with a third person who does not know the extent of his authority, depends, not so much upon the actual authority given or intended to be given by the principal, as upon the question, What did such third person, dealing with the agent, believe and have a right to believe as to the agent's authority, from the acts of the principal?' Among the many other cases in which the same principle is applied are *Saltus v. Everett*, 20 Wend. 267, 268, 32 Am. Dec. 641; *McNeill v. Tenth Nat. Bank*, 46 N. Y. 325, 7 Am. Rep. 341; *Barnard*

v. Campbell, 58 N. Y. 73, 17 Am. Rep. 208; Edwards v. Dooley, 120 N. Y. 540; Locke v. Lewis, 124 Mass. 1, 26 Am. Rep. 631; Hubbard v. Tenbrook, 124 Pa. St. 291, 10 Am. St. Rep. 585; Griggs v. Selden, 58 Vt. 561.

"The apparent authority of the agent which thus binds the principal, beyond that actually conferred, must always be deduced from authorized acts of the agent, and from surrounding facts with a knowledge of which the principal is chargeable, and not from the acts of the agent himself in excess of his authority and of which the principal had no notice. The public may safely judge the agent's authority from the garb with which his principal has invested him, but not from that with which he has clothed himself. To intrust an agent or bailee with the mere possession of property does not give him an apparent authority to sell, nor will possession with power to sell always justify an inference of ownership in the agent. Whether an innocent third person may justly attribute to an agent powers which he does not possess, whether he may properly deal with him as a principal, or may treat one who is intrusted with both the possession and the power to sell as the owner of the goods, must depend to a great extent upon the facts peculiar to each case. Established customs, and usages of trade, the character of the agent's business, and the manner in which it is conducted, and other circumstances which ought to warn a prudent person against treating as owner one who has the possession of personal property and who offers it for sale, often control the decision of particular cases.

"In *Levi v. Booth*, 58 Md. 305, 42 Am. Rep. 332, the owner of a valuable diamond ring placed it in the hands of a street peddler of articles of jewelry, and who had no established place of business, with authority to obtain a match for it, or, failing in that, to procure an offer for it, but without authority to sell. The defendants, who claimed to have purchased the ring of the peddler for cash and other goods, were pawnbrokers and dealers in jewelry, who had been in the habit of selling goods to the peddler on credit. Upon these facts a verdict for the plaintiff for the value of the ring in an action of trover was affirmed upon appeal.

"In *Meldrum v. Snow*, 9 Pick. 441, 445, 20 Am. Dec. 489, in sustaining the title of the brewers of certain casks of beer, against the attaching creditors of a retail dealer in whose hands the brewers had placed it to be sold in his retail trade, the court said that the custom of poor persons of taking beer to sell appeared to be so general that the retailers would not be supposed to be the owners of the beer, and that therefore no injury could arise to their creditors. As a further reason for its decision, the court said: 'It being beneficial to the community to introduce the use of beer, public policy would justify us in favoring the custom.'"

FACTORS—SALES BY.—TO PASS THE TITLE of the principal's property, a factor must sell according to the usages of trade: *Benny v. Rhodes*, 18 Mo. 147, 59 Am. Dec. 293. On sales by factors, see the monographic notes to *Williams v. Merle*, 25 Am. Dec. 615, 616; *Bigelow v. Walker*, 58 Am. Dec. 162, 163. On the vesting of title by a consignment for sale, see the monographic note to *Aetna Powder Co. v. Hildebrand*, 45 Am. St. Rep. 203-210.

PLATT v. WATERBURY.

[72 Connecticut, 531.]

A MUNICIPAL CORPORATION IS LIABLE FOR THE ACTS OF ITS COMMISSIONERS within the scope of their authority.

WATERS AND WATERCOURSES—RIPARIAN RIGHTS.—Whether or not the use of a river by a riparian proprietor is a reasonable use in view of the rights of other riparian proprietors depends largely on the circumstances of each case, and is essentially a question of fact.

WATERS AND WATERCOURSES—POLLUTION—NUISANCE.—The use of a stream for drainage may, under some circumstances, be reasonable, although the water is thereby rendered unfit for its primary use, but the concentration of the filth accumulated by one proprietor, whether an individual or a municipal corporation, and its discharge into the stream in such quantities that it is necessarily carried to the premises of another, where it produces a nuisance dangerous to his health and destructive of the value of his property, is unreasonable and creates liability.

WATERS AND WATERCOURSES—POLLUTION.—MUNICIPAL CORPORATIONS CANNOT ACQUIRE BY PRESCRIPTION any right to maintain a nuisance, consisting in the pollution of a stream, to the necessary injury of the health and property of another.

GOVERNMENTAL USE may include any act which the state may lawfully perform or authorize, and in this sense a governmental act is one done in pursuance of some duty imposed by the state on a person, individual or corporate, which is one pertaining to the administration of government, and is imposed as an absolute obligation on a person who receives no profit or advantage peculiar to himself from its execution.

WATERS AND WATERCOURSES—POLLUTION BY MUNICIPAL CORPORATION.—The mere granting of authority to a city to construct, for the convenience and benefit of its inhabitants, sewers adapted to carry off refuse matter to some neighboring stream, does not necessarily make such use of the sewers a governmental use so as to exempt the city from liability to lower riparian proprietors injured by such sewage.

WATERS AND WATERCOURSES—POLLUTION BY MUNICIPAL CORPORATIONS.—The right of a city to pour into a river surface drainage does not include the right to mix with that drainage filthy and noxious substances in such quantities that the river cannot dilute them nor safely carry them off without injury to the property of others. The latter act is, in effect, an appropri-

tion of the bed of the river as an open sewer to carry such substances to the property of the lower proprietor, and is an invasion of his property rights. When done for a public purpose this may become justifiable, but only upon payment of compensation for the property thus taken.

WATERS AND WATERCOURSES—POLLUTION BY CITY—RIPARIAN RIGHTS.—If a city maintains a nuisance by discharging its accumulated filth and sewage in a stream to the injury of a lower proprietor, the fact that he also owns property in such city does not show such contribution to the injury of his lower land, as to deprive him of equitable relief.

INJUNCTIONS.—The granting, or refusal to grant, an injunction rests in the sound discretion of the trial court, and its action cannot be disturbed in the absence of clear proof of an abuse of such discretion.

Action to restrain a city from polluting a stream with its sewage, to the injury of a lower proprietor on such stream, and also to recover damages. Judgment for plaintiff, and defendant appealed.

L. Harrison, J. O'Neill, L. F. Burpee, and J. P. Kellogg, for the appellant.

J. W. Alling and G. E. Terry, for the appellee.

546 HAMERSLEY, J. There is no error in the disposition of the preliminary motions.

The demurrer to the special defense was properly sustained. Under the charter of the city of Waterbury, the board of sewer commissioners is established to execute certain powers vested in the city, and the municipal corporation is responsible for the acts of the commissioners within the scope of their authority. The action complained of in the complaint was the action of the city: *West Hartford v. Board of Water Commrs.*, 44 Conn. 360, 369.

Sustaining the demurrer to the three special defenses subsequently filed is not ground for a new trial. These defenses contained certain allegations of facts that may be admissible under the issues formed by the denials of the several paragraphs of the complaint; possibly some of these allegations might have been retained in the answer as explaining the nature of the denials, but, if so, the defendant has not been injured. It has gone to trial on the denial of the facts stated in the complaint, and it has had the benefit of all evidence that it could have introduced under the special defenses. All claims of law arising on these defenses are also fully presented in the record by the action of the court in overruling the claims of

the defendant as to the legal effect of the facts found, and will be considered in disposing of those claims.

The court did not err in overruling the defendant's claims set forth in paragraph 33 of the finding. To understand the precise nature of the questions of law involved, it is convenient to briefly restate the material facts. The plaintiff ⁵⁴⁷ owned an ancient water privilege on the Naugatuck river below the defendant city, and also the land on the river and large manufacturing establishments run by the water power; the river drains a section somewhat thickly populated and largely used for manufacturing; by this use of the river, reaching back to the early settlement of the Naugatuck valley, its water prior to 1884 had become polluted to a considerable extent, rendering it unfit for primary uses; about 1884 the defendant constructed, under authority from the legislature, certain main and lateral sewers, by means of which filthy and noxious substances accumulated by inhabitants of the city were collected and discharged into the river in such quantities that the water was inadequate to dilute such sewage, and the same was carried to the premises of the plaintiff, producing the injuries complained of; before the construction of the sewers the pollution of the river was not of such a nature as to produce such injuries.

The defendant claims that its use of the river is a reasonable use, and is justified by the fact that the water of the river has been, for an indefinite period, given up to secondary uses. This claim is substantially disposed of by the court as a question of fact. Whether or not the use of a river by a riparian proprietor is a reasonable use, in view of the rights of other riparian proprietors, depends largely on the circumstances of each case, and is essentially a question of fact: *Keeney etc. Mfg. Co. v. Union Mfg. Co.*, 39 Conn. 576, 581. The inference of the trial court from the special facts found, that the city's use of the river is an unreasonable one, is the only inference that can legally be drawn from those facts. The use of a stream for drainage may, under some circumstances, be reasonable, although the water is thereby rendered unfit for its primary use; but the concentration of the filth accumulated by one proprietor, whether an individual or a municipal corporation, and its discharge into the river in such quantities that it is necessarily carried to the premises of another where it produces a nuisance dangerous to his health and destructive

of the value of his property, must be unreasonable: *Morgan v. Danbury*, 67 Conn. 484, 493. If the ⁵⁴⁸ defendant has, as claimed, a prescriptive right to pollute the river in the manner used prior to 1884, that right does not justify it in further polluting the river by an additional and different use; and the defendant cannot acquire by any prescription a right to maintain a nuisance like that described in the finding: *Nolan v. New Britain*, 69 Conn. 668, 683. Its defense, therefore, must rest wholly on legislative authority.

The main contention of the defendant may be stated in this way: The use of the sewers, under authority of the legislature, in the manner described, is a public governmental use; the injuries to the plaintiffs result from this governmental use, and are not direct but merely consequential; the victim of consequential injuries resulting from a governmental use is entitled to no remedy unless one is given by statute; the defendant's charter provides no remedy for consequential injuries resulting from the use of said sewers; ergo, the plaintiff has no remedy, and its damage is *damnum absque injuria*.

The premises essential to this conclusion are untrue. A governmental use may include any act which the state may lawfully perform or authorize. There are, however, governmental acts to which certain immunities attach; and it is with this restricted meaning that the phrase is used by the defendant. In this sense a governmental act is one done in pursuance of some duty imposed by the state on a person, individual or corporate, which duty is one pertaining to the administration of government, and is imposed as an absolute obligation on a person who receives no profit or advantage peculiar to himself from its execution. It is the state, exercising its governmental power through an agent, who in this matter is the agent of the state, and nothing more. It is to be distinguished from a large class of governmental acts which the state, by way of grant or special privilege, authorizes persons to perform in part for their personal benefit. The principal immunities belonging to a governmental act, in this restricted sense, are: 1. Freedom from personal responsibility for the consequences of the act done. So long as a lawful ⁵⁴⁹ mandate of the state is faithfully executed, the agent acting within the scope of that authority enjoys the exemption from suit which belongs to the state. 2. Freedom from personal responsibility for the negligence of his servants. The rule of *respondet superior*

does not apply, because the agent of the state is not the superior; the real superior is the state itself.

The defendant claims these immunities. It may be doubted whether the use of sewers under the charter of the defendant, for the collection and disposition of refuse belonging to its citizens, is a governmental act within the definition given. The charter authorized the construction of sewers for that purpose, but no absolute duty was imposed upon the city; action in pursuance of the authority was at its option and could not have been enforced by any process of law without further legislation. While sewers or drains for the disposition of surface waters collecting in highways may be considered as mere adjuncts of a highway, partaking of its nature as a governmental use (*Cone v. Hartford*, 28 Conn. 363, 372), it is different with sewers for the disposition of refuse and filth accumulated on private property. The disposition of such stuff is in part for the benefit of the property holder. The city represents in such respects the interests of its inhabitants, and is granted certain special powers, in part for the promotion of their interests: *Bronson v. Wallingford*, 54 Conn. 513, 519. It is well settled that there is a clear distinction between those governmental duties imposed upon a city as a mere agent of government, and those governmental powers granted as a privilege primarily for the personal benefit of its inhabitants. But the tests for the demarcation of the two classes of power are not so well settled. When the terms of the statute are clear, they furnish the most reliable test; and some weight, perhaps, may be given to the nature of the power as commonly regarded (*Jewett v. New Haven*, 38 Conn. 368, 377, 379, 387, 389, 9 Am. Rep. 382; *Jones v. New Haven*, 34 Conn. 1, 11, 13, 14), care being taken not to clothe an individual with the immunity of the state beyond the necessity of his agency. The distinction must always be, in some cases, a difficult one to draw. We think it evident that the mere ⁵⁵⁰ granting authority to a city to construct for the convenience and benefit of its inhabitants sewers adapted to carry off their refuse matter to some neighboring stream, does not necessarily make such use of the sewers a governmental use in the sense indicated. On the other hand, it is also evident that the legislature may impose the duty of constructing sewers in such manner as to make the performance of that duty strictly a governmental act.

But if, for the purpose of this case, we concede the defendant's claim that the use is a governmental use, it is nevertheless

less liable to the plaintiff. The injury described by the complaint is not a mere consequential damage, like that resulting wholly from the lawful use of one's own property, or the lawful exercise of governmental power; it is a direct appropriation of well-recognized property rights within the guaranty of the constitution—"The property of no person shall be taken for public use without just compensation therefor"—(*Nolan v. New Britain*, 69 Conn. 668, 683), and so the defendant's claim that its charter does not authorize the condemnation of the plaintiff's property rights is immaterial. Upon a careful examination of the charter as enacted in 1871 (7 Special Acts, 206), and amended in 1881 (9 Special Acts, 233 et seq., 237), in 1883 (9 Special Acts, 839), and in 1884 (9 Special Acts, 954), and applying the rule which requires a law to be so construed, if reasonably possible, as to give it validity, we think the city is authorized to make compensation by agreement or after appraisal, for any private property taken for the purpose of the maintenance and use of the sewers authorized. But if it were otherwise, the defendant would not be benefited. Its whole defense of acting under lawful state authority would then fail, and the mere finding of the facts alleged in the complaint would clearly support the judgment.

The defendant's brief presents its claim in a form somewhat different from that stated in the finding, and certainly novel in this state. It is substantially this: 1. A riparian city has a right to use the river for surface drainage, and such surface drainage necessarily pollutes the water to some extent, increasing with the growth of the city; 2. The use of these legitimate ³⁵¹ drains to carry off the noxious refuse accumulated by its inhabitants becomes in time an absolute necessity; 3. The right of surface drainage is thereby enlarged so as to include the right to discharge into the river, by means of these drains, such noxious refuse. Therefore, the necessities of municipal growth give to the city a right to convey these noxious substances to the property of down-stream proprietors, and so to appropriate that property for public use without compensation.

It is unnecessary now to discuss the limitations to the right of surface drainage, for the second and third propositions are clearly wrong. The right to pour into the river surface drainage does not include the right to mix with that drainage noxious substances in such quantities that the river cannot dilute

them nor safely carry them off without injury to the property of others. The latter act is, in effect, an appropriation of the bed of the river as an open sewer, and the proposition that it may become lawful by reason of necessity is inconsistent with undoubted axioms of jurisprudence. The appropriation of the river to carry such substances to the property of another is an invasion of his right of property. When done for a private purpose it is an unjustifiable wrong. When done for a public purpose, it may become justifiable, but only upon payment of compensation for the property thus taken. Public necessity may justify the taking, but cannot justify the taking without compensation. It may be necessary for a city to thus mix with its drainage such substances, but it is not necessary to pour such mixture into the river, without purification; indeed, the purification is coming to be recognized as a necessity. But however great the necessity may be, it can have no effect on the right to compensation for property taken. The mandate of the constitution is intended to express a universally accepted principle of justice, and should receive a construction in accordance with that principle, broad enough to enable the court to protect every person in the rights of property thus secured by fundamental law.

There are certain apparent, but not real, exceptions to this ⁵⁵² protection. Emergencies may be such as to justify the taking of property without waiting to provide for compensation; property may be destroyed without compensation in certain cases when used unlawfully, or when it has become a thing of danger. But this is not a case of war or conflagration. The plaintiff has not so used its property as to subject it to the harsh police power of confiscation. The plaintiff has certain rights as a riparian land owner. These rights are property within the meaning of our constitutional guaranty, and an invasion of these rights such as the defendant has made is a taking of that property. The legislature has no power to authorize such taking except for public use, and then only upon providing for just compensation: *Kellogg v. New Britain*, 62 Conn. 232, 239; *Wadsworth v. Tillotson*, 15 Conn. 366, 373, 39 Am. Dec. 391; *Harding v. Stamford Water Co.*, 41 Conn. 87, 93; *Nolan v. New Britain*, 69 Conn. 668, 681; *Fisk v. Hartford*, 70 Conn. 720, 731, 66 Am. St. Rep. 147; *Seifert v. Brooklyn*, 101 N. Y. 136, 54 Am. Rep. 664; *Chapman v. Rochester*, 110 N. Y. 273, 277, 6 Am. St. Rep. 366.

In England, the protection of property from appropriation for public use without compensation does not depend on any fundamental law, but upon inherent justice; and the principle is carefully recognized in all legislation authorizing an infringement of private rights. So the legislative authority for emptying the sewage of cities into watercourses and rivers is coupled with the provision that no nuisance is thereby authorized. Such legislation protects private rights in a manner similar to our constitutional legislation. The city of Leeds having obtained an act of parliament for emptying its sewage into the river Aire, claimed that the usual protection was not included in the act, and therefore the city was not responsible for nuisances maintained under an act of parliament, urging the same plea of necessity pressed in this case. James, V. C., held that the act would not bear the construction claimed, and said he would be bound to put any construction on the act "which would prevent such a monstrous injustice." This decision was affirmed by the appellate court, Gifford, L. J., saying: "In construing the act, one must always consider that, if it had a different meaning, ⁵⁵³ it would be against common sense": *Attorney General v. Leeds Corp.*, L. R. 5 Ch. App. 583, 588, 596.

The theory of the defendant, that the necessities of a city may not only justify the taking of riparian rights but the taking without compensation, seems to find support in some Indiana cases: *Richmond v. Test*, 18 Ind. App. 482; *Barnard v. Sherley*, 135 Ind. 547, 41 Am. St. Rep. 454; *Valparaiso v. Hagen*, 153 Ind. 337, 74 Am. St. Rep. 305. We do not find other cases that take this extreme ground. The right to compensation cannot be questioned in this state.

The defendant claims that the plaintiff is not entitled to equitable relief, because it contributed to its own injury: 1. By not arranging its dam and canal so as to effectually prevent the accumulation of noxious substances brought down by the river; 2. By using the sewers in the same manner as other inhabitants of the city. The court finds that devices were used by the plaintiff to mitigate the evil, and that "it did not appear from the evidence that any other means could reasonably be adopted and preserve the full efficiency of the water power"; and also finds that the plaintiff owned property in Waterbury which, prior to 1884, drained into the Naugatuck river, and that after that date, in compliance with the city ordinances, the plaintiff connected this property with the sewer. These facts fall far short of proving that the nuisance com-

plained of was due in part to the fault of the plaintiff, so that it does not come into court with clean hands.

It appears that some steps have been taken by the legislature looking toward the adoption of a plan of sewerage for the whole Naugatuck valley. The present rights of the plaintiff are not contingent on the future action of the legislature; and there is no public policy which forbids the issue of an injunction to protect its rights because of such possible legislative action.

It was plainly unnecessary to incorporate in the order of injunction a provision that it is made subject to the authority of future legislation, or that it should become inoperative if the defendant should hereafter acquire the plaintiff's premises by condemnation.

⁵⁵⁴ The claim is made that the court abused its discretion in granting an injunction under all the circumstances of the case. "The granting or refusal of an injunction rests . . . in the sound discretion of the court, exercised according to the recognized principles of equity": *Fisk v. Hartford*, 70 Conn. 720, 66 Am. St. Rep. 147. We think the trial court has acted within the limits of this discretion. The plaintiff cannot initiate proceedings of condemnation, and it is difficult to see how it can obtain adequate remedy except by injunction. We fail to see how any great public mischief will be produced by compelling the city, within the time limited, either to make compensation for the property taken or to provide proper means for the disposition of its sewage.

Under the practice act, the plaintiff was entitled to claim damages for the injury already done, and an injunction against its continuance.

There is no error in the rulings upon evidence. The testimony of Mr. Platt (stated in paragraph 24 of the finding), that his foreman refused to take charge of the premises because of the stench, was not admissible to prove the fact of the stench, but was admissible to prove the fact that the foreman refused to act on that ground. It was offered for no other purpose. Moreover, the fact of the stench was fully established by direct and proper testimony.

The testimony of Franklin G. Newbert (paragraph 25), that he had refused to work on the plaintiff's premises for a similar reason, was not inadmissible because the refusal was made after the action was brought, although that fact might affect its weight.

The court properly refused to admit the evidence referred to in paragraph 26. It was offered for the purpose of proving the construction of the act of 1881, and for that purpose was an irrelevant fact. For similar reasons the evidence referred to in paragraph 27 was properly excluded.

The defendant was not injured by the admission of evidence of a verbal notice given to the sewer commissioners (paragraph 32), as notice to the city was duly proved.

The complaint charged that the noxious substances committed ⁵⁵⁵ to the river by the defendant produced certain deleterious effects upon the premises of the plaintiff; and it was competent for the plaintiff, certainly in the absence of all objection, to show that this effect was accomplished by the current of the river depositing these substances in the plaintiff's pond and canal leading to its manufacturing establishment, and the court did not err in finding that fact.

There is no error in the judgment of the superior court.

In this opinion the other judges concurred.

WATERS—REASONABLE USE OF.—Each riparian proprietor is entitled to the reasonable use of a natural stream. Whether a use is reasonable depends upon the circumstances of each case: *White v. East Lake Land Co.*, 96 Ga. 415, 51 Am. St. Rep. 141; and is a question of fact for the jury: *Gillis v. Chase*, 67 N. H. 161, 68 Am. St. Rep. 645; *Barnard v. Sherley*, 135 Ind. 547, 41 Am. St. Rep. 454.

WATERS—POLLUTION OF BY CITY.—A city has a right to discharge its sewage into a natural watercourse extending through it, where there is no other reasonable method of drainage, though the waters of the stream are thereby polluted to the injury of lower riparian proprietors: *Valparaiso v. Hagan*, 153 Ind. 337, 74 Am. St. Rep. 305. But an injunction will lie to restrain the pollution of a stream by emptying therein the sewage of a city, thereby rendering the waters unwholesome and unfit for use and creating a private nuisance on the premises of a land owner over which the stream flows: *Dwight v. Hayes*, 150 Ill. 273, 41 Am. St. Rep. 367. And a city may be enjoined from maintaining sewers by which sewage is collected and then carried upon the plaintiff's land, whereby waters there used by him are polluted and the banks of a stream are covered by filthy sediment: *Chapman v. Rochester*, 110 N. Y. 273, 6 Am. St. Rep. 366. If a municipal corporation creates a nuisance on the land of a lower riparian proprietor by discharging its sewage into a stream, it is liable therefor, although others contributed thereto: *Watson v. New Milford*, 72 Conn. 561, post, p. 345. See, too, *Barrett v. Mt. Greenwood etc. Assn.*, 159 Ill. 385, 50 Am. St. Rep. 168; *Good v. Altoona*, 162 Pa. St. 493, 42 Am. St. Rep. 840.

NUISANCE.—THERE CAN BE NO PRESRIPTIVE RIGHT, as a general rule, to maintain a public nuisance: *North Point Irr. Co. v. Union etc. Canal Co.*, 18 Utah, 246, 67 Am. St. Rep. 607. A nuisance is not legalised by length of time: *Dygart v. Schenck*, 23 Wend. 445, 35 Am. Dec. 576.

INJUNCTION—DISCRETION OF COURT.—The granting or refusing of an injunction rests in each particular case in the sound discretion of the court: *Fisk v. Hartford*, 70 Conn. 720, 68 Am. St. Rep. 147. See, too, *Doughty v. Somerville etc. R. R. Co.*, 7 N. J. Eq. 629, 51 Am. Dec. 267.

MUNICIPAL CORPORATIONS—GOVERNMENTAL POWERS AND DUTIES.—A power of a municipality which has relation to public purposes and is for the public good is governmental: *Springfield etc. Ins. Co. v. Keeseville*, 148 N. Y. 46, 51 Am. St. Rep. 667. Municipal duties are governmental when imposed by the state for the benefit of the general public: *Judd v. Hartford*, 72 Conn. 350, ante, p. 812. A municipal corporation, as to the public character of its powers and obligations, represents the state, discharging duties incumbent on the state, but as to the private character of its powers and obligations it represents the pecuniary and proprietary interests of individuals: *New Orleans v. Kerr*, 50 La. Ann. 413, 69 Am. St. Rep. 442.

THE LIABILITY OF A CITY FOR ITS OFFICERS' negligence and misconduct is discussed in the monographic note to *Goddard v. Harpswell*, 30 Am. St. Rep. 376-413.

WATSON v. NEW MILFORD.

[72 Connecticut, 561.]

MUNICIPAL CORPORATION—POLLUTION OF STREAM—NUISANCE—LIABILITY FOR.—If a municipal corporation creates a nuisance on the land of a lower riparian proprietor by discharging its sewage, consisting of surface water and house sewage, into a stream, it is liable therefor, although others contributed to it.

MUNICIPAL CORPORATIONS—POLLUTION OF STREAM—DAMAGES.—A municipal corporation is liable to a lower riparian proprietor for a nuisance created upon his land by the discharge of the city sewage into a stream, and the fact that such proprietor suffers no personal inconvenience from the nuisance because he does not reside in the community is immaterial except on the question of damages. He is entitled to nominal damages at least, although he never visits his lands, and its rental or selling value remains unimpaired.

A NEW TRIAL CANNOT BE GRANTED merely to obtain a slight reduction in damages, little more than nominal, when the plaintiff is entitled to nominal damages at least.

WATERS AND WATERCOURSES—POLLUTION—LICENSE.—Although a riparian owner may have previously fouled the stream to the injury of those below him, this does not constitute a license to those above him to pollute the stream in a similar manner.

MUNICIPAL CORPORATIONS—POLLUTION OF STREAM—DAMAGES.—If a city creates a nuisance upon the land of a lower proprietor by the discharge of its sewage into the stream, the fact that the water remains potable by cattle and inhabitable by fish is immaterial except in mitigation of damages.

NUISANCE—EVIDENCE—DAMAGES.—In an action to recover for a nuisance, evidence of what it would cost to clean up the premises by removing the offensive deposit is relevant on the question of damages.

NUISANCE—EVIDENCE.—In an action against a town to recover for a nuisance caused by the discharge from its sewers, evidence of the vote of the town authorizing the building of the sewers in question, provided a certain sum was raised by voluntary subscription, is admissible, whether the action taken was within the lawful powers of the town or not, and the annual reports of the town selectmen, showing what expenditures had been made on such sewers, are also admissible, although the selectmen might themselves have been called, and the original town accounts produced.

EVIDENCE.—A **CONSTRUCTION CONTRACT** signed by the contractor only is admissible in evidence against the other party thereto in favor of a stranger after the contract has been fulfilled.

APPEAL.—A **BILL OF EXCEPTIONS** filed within five days after the allowance of the appeal, although after the expiration of the term, is seasonably filed.

APPELLATE PRACTICE.—In the absence of a cross-appeal by the appellee, a bill of exceptions filed by him affords no foundation for an enlargement of the judgment, if the point raised does not affect its validity.

Action for polluting a stream by the discharge of sewage, claiming damages and an injunction. Judgment for plaintiff for damages, but injunction refused, and appeal by the defendant.

L. J. Nickerson and J. F. Addis, for the appellant.

J. H. McMahon and F. M. Williams, for the appellees.

564 **BALDWIN, J.** Towns may build townhouses and any necessary outbuildings: Gen. Stats., sec. 130; *White v. Stamford*, 37 Conn. 578, 586. If, by connecting with a sewer, they can save the expense of outbuildings or better accomplish the purposes these might otherwise serve, a reasonable construction of the statute gives them the right so to do.

School districts have similar powers, and, in case of consolidation, the town succeeds to the possession of their property and the responsibilities attaching to such possession: Gen. Stats., tit. 35, cc. 135, 136; Pub. Acts 1893, c. 265, p. 410.

A building owned by a municipal corporation could not be relieved of the rain water falling upon the roof, by precipitating it through a spout upon the lands of adjoining proprietors. Their rights may be equally invaded by the discharge of sewage from it upon their premises. In these respects a

municipality has no greater immunities than any private land owner.

A nuisance was created upon the plaintiffs' land by the deposit of sewage and sediment from sewage, offensive from its appearance or its smell. The use of the sewers which receive the surface drainage from highways, and of that built by the village improvement association, by the defendant, to carry off the sewage from its public buildings, contributed to this injury. That others also contributed to it, and perhaps more largely, did not relieve the town from liability: *Morgan v. Danbury*, 67 Conn. 484, 496.

That the plaintiffs suffered no personal inconvenience from the nuisance, because they did not reside in the vicinity, is ^{see} immaterial. They were entitled to nominal damages at least, for the offensive condition of things upon their land, even if they never visited it, and although its rental and selling value remained unimpaired: *Watson v. New Milford Water Co.*, 71 Conn. 442. If those assessed can be regarded as substantial, they are still so small in amount that no new trial should be granted for their reduction: *Buddington v. Knowles*, 30 Conn. 26; *Holbrook v. Bentley*, 32 Conn. 502, 508.

The action was well brought against the defendant as a town, and not as a consolidated school district. It is a single corporation, and the consolidation simply threw upon it additional powers and duties. It maintained as a town a nuisance previously created by a district.

That the plaintiffs in prior years had discharged sewage and dyes from a hat shop on their premises into the brook did not bar their right of recovery. If they had thus fouled the brook to the injury of land owners below them, it did not operate as a license to land owners above them to use it in a similar way.

That the water remained potable by cattle and inhabitable by fish was unimportant except in mitigation of damages.

The plaintiffs claimed title from the estate of Samuel R. Hill, deceased, under a distribution in the court of probate, which described the premises as "mill and privileges in dam, also lot bounded north on highway, east on James A. Andrews' land, south on Adeline Bostwick's heirs' land, and west on land set to May R. Hill and widow Eliza Hill, as dower, valued at three thousand dollars." On the trial, the administrator was allowed to testify as to what he turned over to the plaintiffs as the mill privilege, and that it was north of the

highway. This was proper. The description in the distribution was a general one, stating no particular location, and, to make it certain, it was legitimate to show by parol what it was of which he delivered possession as part of the estate of the intestate. This laid a proper foundation for the subsequent proof offered by the plaintiffs, that they had held absolute and undisputed possession of all that they thus received from him for twenty years.

⁵⁰⁸ It was within the discretion of the trial court to admit evidence as to the nuisance on the land and the sewers by which it was occasioned, before it had been shown that the town had any share in creating or maintaining it.

Proof of what it would cost to clean up the premises by removing the offensive deposits was relevant to the question of damages.

The town vote of 1881, authorizing the construction of sewers, provided a certain amount were raised by voluntary donations, and making an appropriation for that purpose, by virtue of which sewers were afterward built, into which houses were drained, was admissible, whether the action thus taken was or was not within the lawful powers of the municipality. In either case, the use of such sewers for its own buildings, to the direct damage of the plaintiffs in the manner found, was an actionable wrong: *Nolan v. New Britain*, 69 Conn. 668, 678; *Platt v. Waterbury*, 72 Conn. 531, ante, p. 335.

The annual reports of the selectmen to the town, showing what expenditures had been made for sewers, were legitimate evidence for the plaintiffs, notwithstanding these officers might have been called as witnesses, and the original books of town accounts could have been had. Such reports, if accepted by the defendant, became its declarations, and as such admissible against it. If there were no proof of acceptance, they would be equally admissible as statements of acts done in its behalf made to it by its executive officers at a time when, if in fact unauthorized, there was a full and fitting opportunity to disavow and repudiate them.

The plaintiffs were also properly allowed to introduce the contract between the town and Moses S. Austin, under which he constructed the sewers in question, upon a certain plan and for a certain price, although he was the only signer of the document. That informality was immaterial after the contract had been fulfilled.

A bill of exceptions has been allowed, which was tendered by the plaintiffs on account of the denial of their claim for an injunction. It was not filed during the term, but within five days after the allowance of the appeal. We are of opinion ⁵⁶⁷ that it was seasonably filed, under the Public Acts of 1897, section 16, page 892. That it was not presented before the rising of the court was excused by the delay in making up the finding and the consequent postponement of the date of taking the appeal. The statute must be construed according to its spirit.

The plaintiffs, in argument, have asked for such a modification of the judgment as to add an injunction to the award of damages. Their bill of exceptions, in the absence of a cross-appeal, affords no foundation for such relief; nor is it necessary under the statute to pass for any purpose upon the point which it presents, since it in no manner affects their right to damages, and no new trial is granted.

There is no error.

In this opinion the other judges concurred.

WATERS—FURTHER POLLUTION OF.—The fact that a watercourse is already polluted and contaminated does not entitle other persons to add thereto, nor preclude persons through whose lands the watercourse runs from obtaining relief by injunction against its further pollution: *Barrett v. Mt. Greenwood etc. Assn.*, 159 Ill. 385, 50 Am. St. Rep. 168. If an owner on a stream contributes to its pollution after it has been already polluted above him, but what he contributes renders the water unfit for stock, and charges it with noxious gases, when before it was fit for stock and free from such gases, he will be liable in damages to a lower owner: *Ferguson v. Firmenich Mfg. Co.*, 77 Iowa, 576, 14 Am. St. Rep. 319.

WATERS—POLLUTION OF BY CITY.—On the liability of a city for polluting the waters of a stream, see *Platt v. Waterbury*, 72 Conn. 531, ante, p. 335, and note.

A NEW TRIAL WILL NOT BE GRANTED to enable one to recover nominal damages: *Bangor etc. R. R. Co. v. Smith*, 49 Me. 2, 77 Am. Dec. 246.

CASES
IN THE
SUPREME COURT
OF
GEORGIA.

UNION FRATERNAL LEAGUE v. WALTON.

[109 Georgia, 1.]

INSURANCE UPON ONE'S OWN LIFE FOR ANOTHER'S BENEFIT IS VALID.—A person has an insurable interest in his own life and may lawfully insure it for the benefit of anyone whose interests he desires to promote, although the latter has no insurable interest in the life of the former.

INSURANCE UPON ONE'S OWN LIFE FOR ANOTHER'S BENEFIT—RIGHT OF BENEFICIARY TO RECOVER.—If one obtains a contract of insurance on his own life, and keeps up the same out of his own means, and directs the amount of the policy to be paid at his death to another whom, from love, friendship, or any other reason, he desires to benefit, the beneficiary named is entitled to recover on such contract, although it may not be shown that the beneficiary had any other insurable interest in the life of the deceased than existed in his goodwill and emanated from his expressed wish to benefit.

INSURANCE—MUTUAL BENEFIT SOCIETIES—RIGHT OF BENEFICIARY TO RECOVER.—A beneficiary, named by a member of a fraternal or benevolent association which provides for life insurance, is entitled, after the death of such member, to recover the amount of the benefit without showing any insurable interest in the life of the deceased.

INSURANCE—MUTUAL BENEFIT SOCIETIES—CONTRACT OF—WHAT CONSTITUTES.—A contract entered into by a benefit society with a member is executory, and its charter, constitution, and by-laws necessarily form a part of the contract, which is, however, ordinarily manifested by the certificate of membership.

INSURANCE—MUTUAL BENEFIT SOCIETIES—BENEFICIARIES—RIGHT TO DESIGNATE.—If a member of a benefit society, which provides for life insurance, takes out a policy on his own life, he may designate therein whomsoever he pleases as beneficiary, where there is nothing in the charter or by-laws of the organization, or in the statutes of the state, restricting the appointment, and his right to do so cannot be questioned.

Anderson, Felder & Davis, for the plaintiff in error.

Charles Z. McCord, for the defendant in error.

² LITTLE, J. R. Annie Walton instituted an action against the Union Fraternal League, an insurance corporation of the state of Massachusetts, doing business in Georgia, to recover the sum of two thousand dollars besides interest, being the amount of a certain certificate of membership insurance issued by the defendant company on the life of Sid A. Pughly, Jr., in which the plaintiff was named as the beneficiary. The certificate was taken out by Sid A. Pughly, Jr., on his own life and upon his own application, and kept in force at his own expense as a member of the local lodge of the defendant company doing business in Laurens county, Georgia. To the petition was annexed a copy of the certificate of membership and insurance, by which it appears that the defendant company undertook to pay, out of its beneficiary fund of the class in which the certificate was issued, a sum of money, not exceeding two thousand dollars, to Mrs. R. Annie Walton on the death of Pughly. In the certificate the beneficiary, Mrs. Walton, is named as "cousin." Attached to the certificate are a number of conditions, to which no particular reference need be made. Certain tables of designations and figures are also printed on the back of the certificate, and in reference to them is a collection of rules designated as "laws on the foregoing table," which seem to be more in the nature of explanation than of arbitrary rule. Among these we find the following: "Speculative risks will not be tolerated, nor will any benefits be paid to other than blood relatives, or dependents on the member." "The foregoing plan of family protection is devised to insure permanent success, and to restrict the admission of undesirable people." It appears from the certificate that the defendant is a Massachusetts corporation, and the signatory clause recites that it was executed in Boston, Massachusetts. It does not, however, otherwise appear whether the contract was executed in Georgia or Massachusetts, nor does the record contain the charter of the defendant company, nor any part of its constitution or by-laws. The defendant filed a demurrer to the petition, on the sole ground that it set forth no cause of action, because it did not appear that the said Mrs. R. Annie Walton, the beneficiary named in the certificate of insurance, had any ³ insurable interest in the life of the insured Pughly,

it being admitted as a fact on the hearing that the beneficiary was not related to the assured on whose life the insurance was taken out by himself for her benefit. The demurrer was overruled, and error assigned to that judgment. One question only arises for determination under the record in this case; that is, whether a beneficiary, named by a member of a fraternal or benevolent association which provides for life insurance, is entitled, after the death of such member, to recover the amount of the benefit without showing any insurable interest in the life of the deceased. The contention of the plaintiff in error is that the contract under consideration must be governed by the principles of law applicable to ordinary contracts of life insurance, and the legal proposition is submitted that a policy in favor of one who has no insurable interest is void, as it is a wager contract and against public policy. We cannot assent to the correctness of this proposition.

A contract of life insurance is defined by our Civil Code, section 2114, as one by which the insurer for a stipulated sum engages to pay a certain amount of money if another dies within the time limited by the policy. The last paragraph of this section is in the following words: "The life may be that of the assured, or of another in whose continuance the assured has an interest." Taken together, the meaning of the section is, that one may insure his own life without qualification; that he may not insure the life of another unless he has an interest in the continuance of the life of that other. Necessarily, in the first instance, the amount of the policy is to be paid to some one other than the insured, because ordinarily under the contract the amount is not payable until his death. By section 2116 of the Civil Code it is provided that the assured may direct the money to be paid to his personal representative, or to his widow, or to his children or to his assignee; and it is further provided that when the insurer gives such directions, no other person can defeat the same, and that the assignment is good without such assent. We are aware that there is a seemingly irreconcilable conflict between the adjudicated cases as to whether the assignee of a life policy takes anything under the ⁴ assignment unless he has an insurable interest in the life insured. But it will be noted that under the provisions of our code no such qualifications are made essential to the validity of the assignment, nor do we think under sound reasoning any can exist. The rule which restricts the execu-

tion of a valid contract of insurance on the life of another to one who has an insurable interest in that life is founded alone on public policy, and it may be stated in general terms that where one has an interest in a life that interest is insurable. Beyond all controversy a man has an insurable interest in his own life, and we fail to see, when having that interest he enters into a contract with an insurer by which, for a stipulated sum which he periodically pays, the insurer becomes liable to pay a given sum of money at the death of the insured, why he who is most interested, whether actuated by the ties of relationship, motives of friendship, gratitude, sympathy, or love, may not make the object of his consideration the recipient of his own bounty. If it be replied that a temptation is extended to the beneficiary by improper means to hasten the time when he should receive the amount of the policy (and it is for this reason that such contracts will only be upheld when the idea of temptation is rebutted by the natural ties of blood or affinity), we might well ask ourselves why executory devises, bequests, provisions for support and maintenance provided for friends and even strangers are not subject to the same inhibition, as being against public policy. But while, as we have before said, many adjudicated cases, frequently contrary to natural justice, clearly hold that unless the beneficiary or assignee has an insurable interest in the life of the insured the policy or assignment is void, we shall undertake to show by authority that such is not the rule of the law.

Mr. Greenwood, in his treatise on the Doctrine of Public Policy in the Law of Contracts, pages 279, 280, lays down two rules so abundantly supported by adjudicated cases as to make their citation impracticable here. The first is: "A policy of insurance issued on the life of one in whose life he to whom the policy is issued has no insurable interest, unless he is a mere trustee for the life assured, or a policy issued to one upon his own ⁵ life, if he be merely the agent of another who is without interest, for whose benefit the insurance is thus taken, although upon the face of it it is payable to such person, is void." The second is: "But one may insure his own life for the benefit of any person, although the latter may have no insurable interest in the life of the former." In support of the rule last laid down, the author quotes from a leading case, *Provident Life Ins. Co. v. Baum*, 29 Ind. 240, the following strong and expressive language: "It cannot be questioned . . . that a person has an insurable interest in his own life,

and that he may effect such insurance, and appoint anyone to receive the money in case of his death during the existence of such policy. It is not for the insurance company, after executing such a contract, and agreeing to the appointment so made, to question the right of such appointee to maintain the action. If there should be any controversy as to the distribution among the heirs of the deceased of the sum so contracted to be paid, it does not concern the insurers. The appellant's contract with the insured is to pay the money to the appellee, and upon such payment being made, it will be discharged from all responsibility. So far as the insurance company is interested, the contract is effective as an appointment of the appellee to receive the sum insured."

Mr. Joyce in his Treatise on Insurance, volume 2, section 918, declares that "the weight of authority seems also to favor the proposition that if a person effects a valid insurance upon his own life, and the transaction is bona fide and not intended to circumvent the law, the assignment to another will be upheld, even though the assignee has no insurable interest in the life insured." In the case of *Amick v. Butler*, 111 Ind. 578, 60 Am. Rep. 722, Mitchell, J., delivering the opinion, refers to this question in the following language: "It has never been seriously questioned but that a person may insure his own life, and by the terms of the policy appoint another to receive the money upon the event of the death of the person whose life is insured; or, having taken a policy valid in its inception, that he may in good faith assign his interest in such policy, as in any other chose in action." For which he cites *Hutson v. Merrifield*, 51 Ind. 24, 19 Am. Rep. 722; *Franklin Life Ins. Co. v. Sefton*, 53 Ind. 380; *Ashley v. Ashley*, 3 Sim. 149; *Mutual Life Ins. Co. v. Allen*, 138 Mass. 24, 52 Am. Rep. 245; *Clark v. Allen*, 11 R. I. 439, 23 Am. Rep. 496. He further says: "In either ⁶ case the essential point is that the transaction be bona fide, and not merely a cover for obtaining wagering or merely speculative insurance, and a device to evade the law": Citing *Provident Life Ins. etc. Co. v. Baum*, 29 Ind. 236; *Olmsted v. Keyes*, 85 N. Y. 593; *Campbell v. New England Mut. Life Ins. Co.*, 98 Mass. 381; *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 457; *Guardian etc. Ins. Co. v. Hogan*, 80 Ill. 35, 22 Am. Rep. 180; *Cunningham v. Smith*, 70 Pa. St. 450. And in relation to the conflict between such rulings and the adjudicated cases which seem to hold otherwise, he says: "The cases which hold invalid the taking or assignment of

insurance policies turn upon the fact that in each case the transaction was found to be merely colorable, and a scheme to obtain speculative insurance": Citing *Franklin Life Ins. Co. v. Hazzard*, 41 Ind. 116, 13 Am. Rep. 313; *Cammack v. Lewis*, 15 Wall. 643; *Warnock v. Davis*, 104 U. S. 775. Mr. Justice Bradley, in the case of *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 460, in discussing what is an insurable interest, says: "But precisely what interest is necessary, in order to take a policy out of the category of mere wager, has been the subject of much discussion. In marine and fire insurance the difficulty is not so great, because there insurance is considered as strictly an indemnity. But in life insurance the loss can seldom be measured by pecuniary values. Still, an interest of some sort in the insured life must exist. A man cannot take out insurance on the life of a total stranger, nor on that of one who is not so connected with him as to make the continuance of the life a matter of some real interest to him. It is well settled that a man has an insurable interest in his own life, and in that of his wife and children, a woman in the life of her husband, and the creditor in the life of his debtor. Indeed, it may be said generally that any reasonable expectation of pecuniary benefit or advantage from the continued life of another creates an insurable interest in such life. And there is no doubt that a man may effect an insurance on his own life for the benefit of a relative or friend, or two or more persons on their joint lives for the benefit of the survivor or survivors. The old tontines were based substantially on this principle, and their validity has never been called in question."

In the case of *Loomis v. Eagle Life Ins. Co.*, 6 Gray, 399, Chief Justice Shaw, delivering an opinion which involved the question of insurable interest, used this language: "All, therefore, which it seems necessary to show, in order to take the case out of the objection of being a wager policy, is that the insured has some interest in the life of the *cestui que vie*; that his temporal affairs, his just hopes and well-grounded expectations of support, of patronage, and advantage in life will be impaired; so that the real purpose is not a wager, but to secure such advantages, supposed to depend on the life of another; such, we suppose, would be sufficient to prevent it from being regarded as a mere wager. Whatever may be the nature of such interest, and whatever the amount insured, it can work no injury to the insurers, because the premium is pro-

portioned to the amount; and whether the insurance be to a large or small amount, the premium is computed to be a precise equivalent for the risk taken. Perhaps it would be difficult to lay down any general rule as to the nature and amount of interest which the assured must have. One thing may be taken as settled, that every man has an interest in his own life to any amount in which he chooses to value it, and may insure it accordingly." In the case of *Sabin v. Phinney*, 134 N. Y. 423, 30 Am. St. Rep. 681, it was held that a member of the Ancient Order of United Workmen of New York can legally direct the sum due at his death to be paid to a stranger who has no insurable interest in his life. The true rule, as we take it, on the authority of a very large number of cases collected in a note to the case of *Morrell v. Trenton etc. Ins. Co.*, a Massachusetts case reported in 57 Am. Dec. 102, is, that one may insure his life and make the amount of the policy payable to whom he pleases, provided the contract is not made at the expense and for the benefit of the person designated as the beneficiary, as a cover for a mere wagering contract. In the same note authorities are cited for the proposition, "that the insurable interest which one has in his own life is what supports the policy in such a case." As laid down in *Field's Lawyers' Briefs*, sec. 417, the rule is that: "Any person may insure his own life for the benefit of his creditors, relatives, friends, or even strangers. But if the insurance is effected by some other person, it is essential that he have a pecuniary interest in the life of the assured." To the same effect see *Robinson v. United States Acc. Assn.*, 68 Fed. Rep. 825; *Olmsted v. Keyes*, 85 N. Y. 593; *Lemon v. Phoenix Mut. Life Ins. Co.*, 38 Conn. 294; *Fairchild v. North Eastern Mut. Life Assn.*, 51 Vt. 625. We think, also, that this court has recognized the doctrine for which we^s are contending, in the case of *Equitable Life Assur. Soc. v. Paterson*, 41 Ga. 338, where *McCay, J.*, declared that the law which prohibits the insurance of a life by another who has no interest in the continuance of that life is founded on a sound public policy, and that it was intended to prevent gaming policies and to avoid that inducement to crime which would exist if it were permitted. In the case then under consideration, it appeared that a woman who contracted marriage had at the time a living husband, making, of course, the last contract of marriage void. While living together under such void marriage, the supposed husband procured a policy of in-

insurance on his life in favor of the woman with whom he was then living. Payment of the policy was resisted on the ground that she had no insurable interest in the life of the person insured. This court there held that such a contract of insurance did not come within the reason of the law which prohibited gaming policies, nor was it open to the objection that it offered an inducement to crime. Judge McCay, in his opinion, on this subject said: "Though the marriage was illegal, yet in fact the woman had an interest, and a deep interest, in the life of the husband. He treated her as his wife. He supported her as such, she passed in society as such, and she was dependent upon him for support as such. It was the husband who in fact effected this policy. It was his own method of extending to this woman his assistance and protection after he should himself be dead. Here is no gaming, since the very person whose life is insured is himself the actor in the transaction. So, too, as to the temptation to crime, offered to the beneficiary of the policy. It would seem, when the person whose life is insured is himself the actor in the matter, the amount of temptation held out to others to take his life may, as a general rule at least, be left to his discretion." Further on in the same opinion, referring to the provision now found in our code which expressly permits the insured to direct the money to be paid to his assignee, he says, "and if he may do this, we do not see that an insurance effected by him, as the assured of another, for that other's benefit, is not equally good."

We have entered into the discussion of this case at length, because of the fact, as stated in the outset, that the adjudicated cases are in conflict. But we feel assured, both by reason and the long line of adjudicated cases to which only partial reference has been made, that the true rule which should obtain in such cases is, that where one obtains a contract of insurance on his own life and keeps up the same out of his own means, and directs the amount of the policy to be paid at his death to another whom from love, friendship, or any other reason he desires to benefit, the named beneficiary is entitled to recover on such contract, notwithstanding it may not be shown that he or she has any other insurable interest in the life of the deceased than exists in his goodwill and emanates from his expressed wish to benefit. It is, after all, but a gift from him to one whose interests he desired to promote and whose welfare he wished to protect when he was dead.

Such a contract is in no sense a mere hazard, and is composed of none of the elements which make up a wagering policy, and it is only these that the law, mindful of the best interests of the citizen, prohibits. There is, however, another view to be taken of the question which arises in this case. Differences exist between contracts entered into under the plan of ordinary life insurance and those made by benefit societies. We only call attention, however, to those differences which exist in the selection of the beneficiary. A contract entered into by a benefit society with a member is, of course, executory, and its terms and conditions are ordinarily manifested by the certificate of membership. In addition to such, the charter of the society, its constitution, and by-laws necessarily form a part of such contract: *Arthur v. Odd Fellows' Ben. Assn.*, 29 Ohio St. 557; *Hellenberg v. District No. 1 of I. O. etc.*, 94 N. Y. 580; *Maryland Mut. Ben. Soc. v. Clendinen*, 44 Md. 429, 22 Am. Rep. 52. The law which provides for the organization of a benefit society usually specifies the classes of persons who may be made beneficiaries of the insurance; and where the organic law of the society, or the charter procured from the state under that law, prescribes what classes of persons may become beneficiaries of its insurance, it is not in the power of the society or one of its members, or both, to enlarge or restrict these classes; for the society has no authority to create a fund for a person who does not belong to one of such classes, and the member has no right or power to ¹⁰ designate such person as his beneficiary: *Niblack on Accident Insurance and Benefit Societies*, sec. 158; citing *Mutual Ben. Assn. v. Rolfe*, 76 Mich. 146; *Kentucky Masonic Mut. L. Ins. Co. v. Miller*, 13 Bush, 489; *Rindge v. New England Mut. Aid Soc.*, 146 Mass. 286. Under an act of the state of Michigan which authorized the organization of societies to secure to the family or heirs of any member upon his death a certain sum of money, it was held that no other person than a member of the family or an heir of the person insured could be made a beneficiary, and an old army comrade and intimate friend who had been designated by the member as the beneficiary could not take: *Mutual Ben. Soc. v. Hoyt*, 46 Mich. 473. A large number of adjudicated cases supporting this principle may be found in *Bacon's Treatise on the Law of Benefit Societies and Life Insurance*, section 237; and the reason which underlies the rule is, that the member of the society has under his contract no

interest nor property in the benefit, but has simply the power to appoint some one to receive it. If, however, there is nothing in the charter or by-laws of the organization, nor in the statutes of the state, restricting the appointment, the member may designate whomsoever he pleases, and no one can question the right: 1 Bacon on Benefit Societies, sec. 246; Massey v. Mutual Relief Soc., 102 N. Y. 523; Knights of Honor v. Watson, 64 N. H. 517; Walter v. Hensel, 42 Minn. 204.

In the present case, while it appears on the face of the certificate that the plaintiff in error is a Massachusetts corporation, none of the provisions of the charter appear in the record, nor any portion of its constitution or by-laws is set out, nor can it be now determined whether the contract of insurance is to be governed by the laws of the state of Massachusetts or by those of Georgia. Hence, no restriction of the power of the member to name the beneficiary is made to appear, and the certificate evidencing a contract of life insurance similar to those entered into by mutual companies, the case will be determined under the general law applicable to insurance contracts. It is true that on the back of the certificate appears a condensation of certain explanations, in which it is asserted that speculative risks will not be tolerated nor benefits paid to other than blood relatives or dependents. It does ¹¹ not appear, however, unqualifiedly, as it is arranged, that it is one of the conditions referred to in the certificate, and without further explanation we are not able to say that it is. Therefore, so far as the record appears, there was nothing to restrict the designation of the beneficiary by Pughslly at the time he entered into the contract, and by the terms of the contract the benefit fund is made expressly payable to the defendant in error. Being so, and treating this contract as subject to the law which fixes the insurable interest of a beneficiary where the policy is taken out and maintained by the insured, no reason appears why the defendant in error was not entitled to maintain her action; and the judgment of the court below in overruling the demurrer is affirmed.

All the justices concurring except Lumpkin, P. J., dissenting.

LUMPKIN, P. J., dissenting. A policy of life insurance naming as the beneficiary thereof one who has no insurable interest in the life of the insured is a wagering policy, and there-

fore void, although taken out by the insured at his own expense. Independently of adjudications rendered outside of this state, I am of the opinion that the question raised in this case is settled by section 2114 of the Civil Code, which reads as follows: "An insurance upon life is a contract by which the insurer, for a stipulated sum, engages to pay a certain amount of money if another dies within the time limited by the policy. The life may be that of the assured, or of another in whose continuance the assured has an interest." That is to say, the life insured may be that of the beneficiary named in the policy, or the life of another person in the continuance of which life the beneficiary has an insurable interest. "The beneficiary of an insurance policy may be defined as the party to whom the proceeds are made payable by the terms of the contract"; and "beneficiary" and "assured" are synonymous terms, though the former is the more commonly used: 3 Am. & Eng. Ency. of Law, 2d ed., 926.

The question at issue was neither made in nor passed upon by this court in the case of *Equitable Life Assur. Soc. v. Paterson*, 41 Ga. 338. It is true the report of that case discloses that in the request to charge, made by counsel for the defendant, ¹² this question was presented to the trial judge for his determination; but the motion for a new trial, the denial of which was the only ruling excepted to, did not in the remotest manner invoke a decision of the question whether one can take out a valid policy of insurance on his own life for the benefit of a stranger; nor is any such question dealt with in the synopsis of the points decided, which, under our statute, is the official announcement of the decision rendered. Accordingly, the remarks of Judge McCay upon the subject of insurable interest should be treated as merely obiter and in no sense binding as authority.

IN *MORRIS v. GEORGIA ETC. BANKING CO.*, 169 Ga. 12, it was held that an assignment of a policy of life insurance to a creditor by the insured, and for the purpose of securing his indebtedness, is, as a matter of law, valid only to the extent of the amount of the debt and the expenses incurred by the creditor in keeping up the policy; that if a balance remains after paying such debt and expenses, the payee of the policy is entitled to it; and that the amount of the debt, in case of dispute over it, is a question of fact for a jury.

In this case, one Ragland procured a policy of insurance upon his own life, for the sum of five thousand dollars, on which the an-

nual premium was one hundred and three dollars and fifteen cents. He paid two quarterly premiums, but, not being able to continue the payment of premiums, two of the defendants, Cassin and Purtell, agreed to advance to him the amounts necessary to pay the same as they became due; and to secure payment of the amount so advanced, Ragland assigned the policy to Cassin and Purtell, who required and received of Ragland his promissory note, for four thousand three hundred dollars, principal, to become due one year after date. This pretended debt was fictitious except as to the premiums advanced by Cassin and Purtell. At the time of these transactions Cassin was the cashier of the defendant banking company. After the execution of the note Cassin and Purtell indorsed it in blank and made a pretended transfer of it to the defendant banking company, which took the note with notice of its character. Shortly before the maturity of the note Cassin and Purtell transferred the policy of insurance to the banking company, and soon afterward Ragland died. The insurance company paid to the banking company the face value of the policy. The amount of the policy was payable to the representatives of Ragland, and the only claim that Cassin and Purtell and the banking company had on the fund was the amount of one premium. As the banking company insisted that it had a right to keep the money, Ragland's administrator, Morris, brought suit to recover the amount paid to it, less what had been advanced to Ragland by Cassin and Purtell. A nonsuit was granted, but on appeal it was held that the administrator would, in law, be entitled to have the balance left after payment of the debt which Ragland's assignment secured. Counsel for the defendants also insisted that the banking company was a bona fide holder of the note and transferee of the policy of insurance, for value, before due, and that this fact precluded a recovery by the administrator. But it appeared that Cassin had full authority and control of the discounts of the bank, and that he discounted the note with the funds of the bank without consulting any other officer thereof. The court, therefore, assuming the facts insisted upon by the plaintiff to be true, pointed out that the bank was not a bona fide purchaser of the note, without notice, and held, in substance, that if the bank ratified Cassin's act and claimed title to the note, it must take it subject to the knowledge which Cassin had at the time. "Where one party," said the court, "having knowledge of the invalidity of a paper of which he is the ostensible owner, discounts it in a bank of which he is the duly authorized agent, and is himself the only actor for the bank, and by his act enables the bank to collect and retain the proceeds of such paper against the rights of the true owner, he is either the agent of the bank to discount the paper, or he is not. If he is not, then the discounting was illegal, and the owner is entitled to it or its proceeds. If he is the agent of the bank, and the facts insisted on here existed, his action would be a fraud upon the

rights of the owner, of which the bank cannot take advantage." The court further said: "The subject matter of the present action is to recover from the defendants a sum of money which it is alleged they collected and which belongs to the plaintiff. The collection of the money and its retention by the defendants cannot be based on the fact that they are innocent holders of a promissory note of the insured received before due, for value; the money for which suit was brought did not come into the hands of the defendants as the proceeds of any negotiable instrument; and their right to collect the policy and to hold the amount as payment of the note depends upon the assignment of the policy, and not upon the manner in which they hold the note." It was, therefore, considered error to have granted a nonsuit, there being evidence from which the jury might have found a verdict for the plaintiff.

LIFE INSURANCE—INSURABLE INTEREST—BENEFICIARIES.—A person has such an insurable interest in his own life that he may insure it for the benefit of his heirs, or even for the benefit of a stranger: *Northwestern etc. Aid Assn. v. Jones*, 154 Pa. St. 99, 35 Am. St. Rep. 810, and note showing that a man may insure his own life, paying the premium himself, for the benefit of another who has no insurable interest therein.

INSURANCE—MUTUAL BENEFIT SOCIETIES—RIGHT TO DESIGNATE BENEFICIARY.—If the by-laws of a mutual life benefit society impose no limit as to the persons to whom certificates shall be payable, the person insured in such an association has a right to direct the amount of his certificate to be paid to a stranger having no insurable interest in his life: See monographic note to *Lake v. Minnesota etc. Assn.*, 52 Am. St. Rep. 559, on features of the law specially applicable to mutual or membership life or accident insurance.

INSURANCE—MUTUAL BENEFIT SOCIETIES—WHAT FORMS PART OF CONTRACT.—The charter of a beneficial association is a part of its contract of insurance, the same as though written therein; so, too, are its constitution and by-laws: Note to *Condon v. Mutual Reserve Assn.*, 73 Am. St. Rep. 185.

LONG v. ELBERTON.

[109 Georgia, 28.]

MUNICIPAL CORPORATIONS—ERECTION OF PRISON BUILDING—DAMNUM ABSQUE INJURIA.—A city does not invade property rights by merely erecting and maintaining a necessary prison building within its limits. Hence, no action for damages can be maintained against the city therefor by the owner of adjacent property injured thereby, as the injury to one's business and the depreciation of property in such a case are *damnum absque injuria*. The owner, however, would have a remedy if, after the erection of the building, it is so maintained as to be a nuisance.

J. P. Shannon and P. P. Proffitt, for the plaintiff.

I. C. Van Duzer and J. N. Worley, for the defendant.

²⁸ **LITTLE, J.** The plaintiff instituted an action to recover damages against the city of Elberton. He alleged that he was the owner of a hotel building in said city, and eight brick storehouses adjoining and opposite his hotel; that he expended a large sum of money in the erection of said buildings, which before the damage complained of were worth a large amount of money; that he and his family reside in the hotel, and that the same was made comfortable and pleasant for his family as well as his guests; that during the year 1897 the city of Elberton, without the consent of petitioner and against his protest, erected within one hundred feet of his property a building known as the city prison, which is a brick structure containing offices for the city and a number of prison cells and lockups in which violators of the city laws are confined; that these are frequently drunk, boisterous, profane, obscene, and offensive, and that frequently crowds of objectionable persons are gathered around the city prison, to the annoyance of the neighborhood; that the building is not provided with waterworks or sewers, and that slops and filth are carried therefrom daily in full view of the public; that the prison emits foul air and unwholesome stench, and the inmates make discordant ²⁹ and savage noises, and that the city convicts are kept therein; that this building is so situated that it stands broadside to the hotel building, with no obstruction between the two buildings, and all the unpleasant accompaniments of the prison are in full view of the windows and piazzas of the hotel and of persons dwelling therein or on the grounds attached thereto. He alleges that the same is a nuisance; that

he endeavored to induce the city authorities not to construct the building at that place, informing them that it would injure his business, and the value of his property, but they did so over his protest. He alleges that the erection of the prison was a violation of the public duty and a reckless disregard for his rights, and the maintenance of the same as situated is a gross wrong; that it renders his home undesirable and his hotel building less desirable for a hotel, his storerooms less valuable for business, and has injured the market value of all his property above described, whereby he has been damaged the sum of five thousand dollars; that the city authorities could easily have erected said prison elsewhere, where the damage it would cause would have been insignificant; that he himself offered to the city a lot in rear of his property, which was convenient in every respect, but they refused to erect the prison on that lot; that it was located in its present place as the result of bad faith and on account of ill-will to petitioner. He alleges that the prison and the manner in which it is used and kept is a nuisance and has greatly damaged his property, and that its erection was, and its maintenance is, a direct invasion of his rights, for which he is entitled to recover damages under the constitution and laws of this state. The petition, as amended, was demurred to generally. The court sustained the demurrer, and the plaintiff excepted.

It is claimed by counsel for the plaintiff that since the adoption of the constitution of 1877 a municipal corporation is liable to an individual for damages to private property, to the same extent and under the same circumstances that it is liable for property taken for public purposes; and we understand the present action is based on the provision of that constitution which declares that private property shall not be taken ³⁰ or damaged for public purposes without just and adequate compensation being first paid: Civ. Code, sec. 5729. It is contended that the erection of the city prison in Elberton, and the use of said building for the confinement of violators of the law, in close proximity to the property of the plaintiff, has depreciated the value of said property, and therefore damaged it in the sense contemplated by the constitution. It is not necessary in this case that the meaning of the word "damaged" in the constitution shall be either considered or discussed. It was passed on by this court in the case of *Austin v. Augusta Terminal Ry. Co.*, 108 Ga. 671.

The simple erection of a necessary prison building cannot, without more, so injure adjacent property as to entitle the owner to have damages for such erection. No one is so hindered in the use of his property and so restricted as to the character of buildings he shall put upon it, as to make it necessary to consult adjacent lot owners in reference to the improvements to be made. The lot being his own property, the owner may put it to such use as he sees proper, provided the buildings and improvements made by him do not infringe the legal right of his neighbor to the similar enjoyment of his own property. A loghouse on a fashionable street may be built alongside of a palace, and by its erection the value of the latter may be depreciated, but that depreciation is *damnum absque injuria*. The owner of the lot has as much right to erect the hut as the other has to build his palace—no more, no less; but if the hut or the palace be so used as to interfere in the lawful enjoyment of his property by the other, there the damage with a right to compensation exists. If noxious gases from a business carried on in either befoul the air which the other is entitled to have without it—if the flow of poisonous fluids from a manufactory carried on at either place sterilizes the land of the other—if offensive smells emanate from the one and affect the health of those dwelling in the other, then there is a cause of injury which the law will redress, because the use which brings about any of these things is an infringement on the right of the other; but none can be allowed for the character of the building. The municipal authorities of the ³¹ city of Elberton, being invested with certain powers of government, had a legal right (being necessary to the exercise of those powers) to erect a building for the purpose of furnishing public offices and maintaining a prison in which might be securely kept violators of the law; and the rule is clearly established that a corporation authorized by the law to do a particular thing, so long as it keeps within the scope of the power granted, is completely protected from proceedings either at law or in equity in behalf of the public therefor (2 Wood on Nuisances, sec. 753), and that if in the discharge of a duty imposed by law it proceeds in a careful and prudent manner, the damages resulting therefrom to individuals are *damnum absque injuria*: *Transportation Co. v. Chicago*, 99 U. S. 635; *Sayres v. Commonwealth*, 88 Pa. St. 309, 32 Am. Rep. 455; *Flori v. St. Louis*, 69 Mo. 341, 33 Am. Rep. 504; *Toolan v. Lansing*, 38 Mich. 315.

In the case of *Bacon v. Walker*, 77 Ga. 338, this court, Chief Justice Jackson delivering the opinion, said: "It is true that nobody would be pleased at the erection of a jail in the vicinity of his residence, but it must be built somewhere. It is a public necessity. It is authorized by law. In no sense, or rather in no legal sense, is it a nuisance. Nothing that is legal in its erection can be a nuisance per se; much less can that which public necessity demands be one." It "must be built in some part of the city and near to somebody's house; . . . and equity will not stop the public works because of such damage." And in the case of *Pause v. Atlanta*, 98 Ga. 103, 58 Am. St. Rep. 290, this court, through Atkinson, J., said: "A distinction should be borne in mind between those cases where one seeks to recover because of the appropriation by the public to the public use of private property, and damages to one's property sustained in consequence of the construction of such public improvement, and that other class of cases in which, though one's property be neither appropriated nor damaged, yet in consequence of the construction of such improvement one suffers damage resulting from personal inconvenience, and consequent damage in the conduct of one's business. In the former cases the right of compensation is a matter of principle; the amount of damage, a mere matter of degree. However slight or however great one's damage may be, he is nevertheless entitled to compensation. In the latter class of cases something ³² more must appear than mere damage or inconvenience. It must be made to appear that in the construction of such an improvement the municipal authorities have been guilty of negligence, omission of duty, or negligent commission of an act authorized by law, in order to authorize a recovery." Under the authority of the cases cited, the plaintiff was not entitled to recover for the erection of the prison. Undoubtedly, it added nothing which was desirable to the neighborhood, and detracted much from it, but this and similar inconveniences are to be borne by the citizen in the vicinity of whose property such public buildings are located, and for his inconvenience and depreciation in values in property so occasioned the law affords no compensation. It does not, however, follow, because the erection of such a building was a public necessity and the authorities had the right to select the lot upon which it was erected, that it can be so maintained as to perpetuate a nuisance. While the authorities have a right to use and maintain it for the

purposes intended, the duty rests upon them to maintain it in a proper manner, and if such maintenance after its erection should prove a nuisance, it is the right of any citizen of Elberton, or other person interested, either to abate the same, or, if special and particular damage is caused to him, to obtain proper compensation for his injury: 2 Wood on Nuisances, sec. 748. Inasmuch, however, as the petition seeks to recover damages from the city for the erection and maintenance of the building as a prison, and the law nowhere authorizes such to be given under the circumstances detailed in his petition, the court committed no error in sustaining the demurrer thereto, and the judgment is affirmed.

All the justices concurring.

ERECTION OF JAIL—RAILROADS OVER STREETS—DAMNUM ABSQUE INJURIA.—An injunction will not issue to prevent the erection of a jail on the ground of nuisance. The special damage, in such a case, is incidental to what the general interest of the community requires and becomes *damnum absque injuria*: *Burwell v. Commissioners*, 93 N. C. 73, 53 Am. Rep. 454. So, where a railroad is authorized to run over a highway, including a street, the consequential annoyance is *damnum absque injuria*. The private inconvenience therefrom must be suffered for the public accommodation: *Note to Pennsylvania R. R. Co. v. Angel*, 56 Am. Rep. 13. See, also, *Van de Vere v. Kansas City*, 107 Mo. 83, 23 Am. St. Rep. 896.

SUTTON v. ROSSER.

[109 Georgia, 204.]

HOMESTEAD FOR WIFE AND FAMILY OUT OF HUSBAND'S ESTATE—TERMINATION OF.—A widow is entitled to a homestead and exemption out of her husband's estate for the benefit of herself and family, consisting of minor heirs of the deceased, but such homestead is terminated at her death and the arrival at age of the other beneficiaries.

HOMESTEAD FOR BENEFIT OF "DEPENDENT FEMALES"—HOW TO BE CLAIMED.—There can be, under the laws of Georgia, no homestead or exemption for the benefit of "dependent females," except in the property of the person upon whom they are dependent, and the owner must make the application. A widow cannot obtain such homestead or exemption out of land belonging to the estate of her deceased husband.

HOMESTEAD FOR BENEFIT OF "DEPENDENT FEMALES"—TERMINATION OF.—A homestead to a widow out of her husband's estate for the benefit of "dependent females," if it could be allowed, would terminate upon her death, for there can be no dependency on a person who is dead.

HOMESTEAD FOR BENEFIT OF "DEPENDENT FEMALES" AND MINOR CHILDREN—VALIDITY OF.—A homestead allowed to a widow out of her deceased husband's estate, for the benefit of "dependent females" and minor grandchildren, is valid during the lifetime of the widow and the minority of the grandchildren, but is invalid so far as it seeks to set apart an exemption for the benefit of "dependent females" during their dependency, particularly after the widow's death. Their dependency cannot extend the duration of the homestead estate beyond the death of the applicant.

Levy and claim.

John W. Park and Park & Gerdine, for the plaintiff.

McLaughlin & Jones, for the defendant.

205 LEWIS, J. At the August term, 1879, of Meriwether superior court, John R. Jones obtained judgment against Nancy Rosser as the executrix of Asa Rosser, deceased. The fieri facias issued upon this judgment was kept alive by proper entries thereon, and in 1897 was levied on a certain lot of land in Meriwether county as the property of the estate of Asa Rosser, deceased. Mrs. Nancy Rosser, the widow of the deceased, applied for and had set apart a homestead in this land as property of the estate of her deceased husband, claiming that she was the head of a family consisting of her single daughter Mattie Rosser, thirty-one years of age, her single daughter Emily, twenty-eight years of age, and her two grandchildren aged respectively eighteen and nineteen years. In her petition for homestead she alleged that all the family were dependent on her for support, that she was an aged and infirm person sixty-one years of age, that she was the widow of Asa Rosser, and that the family were his children and grandchildren. The application was approved by the ordinary on March 5, 1897. At the time of the levy of plaintiff's execution upon this land the widow was not in life; all the minor beneficiaries had arrived **206** at age, and none were living on the place, except Mattie Rosser, who was an adult when the homestead was set apart, and who filed a claim to the land levied upon. Upon these facts the court directed a verdict for the claimant. Plaintiff in fieri facias assigns error on the judgment of the court below in overruling his motion for a new trial.

1. It was contended in behalf of claimant that the homestead had not terminated when the levy was made, but that she was still a beneficiary thereof, and it was, therefore, not

subject to levy and sale for the debts of her father, the original owner. One ground in the application for homestead by the widow in this case was that the beneficiaries named in her petition were dependent upon her for support. The constitution of 1877 (Civ. Code, sec. 5912), and the act of the legislature passed in pursuance thereof (Civ. Code, secs. 2827, 2828), did not contemplate a homestead or exemption for the benefit of dependent females, except in the property of the person upon whom they were dependent. In the present case, the application for exemption on this account was not made by the owner of the land in which the homestead was sought. The land belonged to the estate of the applicant's deceased husband. Manifestly, neither the constitution nor the statute intended to confer upon the widow such a right; for, if it did, she would, under some circumstances, have the power to create a homestead encumbrance upon the property of her husband's estate in favor of dependent females who have no interest in the property as heirs, and thus deprive the heirs at law of their legal inheritance. In order for an adult person to be the beneficiary of a homestead solely upon the ground of being a dependent female, this dependency must be upon the person who owns the property sought to be exempted, and the application for such exemption must be made by the owner himself.

2. Were it otherwise than as above stated, we think there would be a necessary termination of the homestead upon the death of the person on whom the beneficiary was dependent, for the law contemplates a dependency for support, not on any particular property, but upon some particular person, and grants to such person the privilege of exempting his own property ²⁰⁷ for the charitable purpose of taking care of such dependent beneficiaries. From the very nature and purpose of the exemption, then, it cannot last longer than the applicant lives. In the case of *Towns v. Mathews*, 91 Ga. 546, it was decided by this court that: "A homestead set apart in 1873 by the head of a family for the benefit of his wife and a minor granddaughter terminated on the arrival at majority of the granddaughter, the family having been previously dissolved by the death of both the other members. The condition of the granddaughter as a dependent female would not extend the duration of the homestead, the person on whom she was dependent being no longer in life." On page 549, Lumpkin, J.,

in his opinion, distinguished that case from one of a widow who, by reason of her widowhood alone, remains beneficiary of the homestead. He says: "No such right belongs, after her majority, to a dependent female who was entitled to be a beneficiary because of the homestead having been granted to the applicant for the reason that the female was dependent on him, and not for her own sake. Moreover, there can be no state of dependency upon a person after that person is dead."

3. Another ground of the application seems to have been based upon the fact that the applicant was the widow of deceased, and also the head of the family consisting of the beneficiaries. There is no question about the fact that the widow is entitled to homestead and exemption out of her husband's estate for her own benefit, and also for the benefit of the family consisting of the minor heirs of the deceased. Such a homestead, however, is terminated upon the death of the widow and the arrival at age of the other beneficiaries: *Lee v. Hale*, 77 Ga. 1; *Vornberg v. Owens*, 88 Ga. 237.

4. It follows from the above that while this homestead was no doubt valid during the lifetime of the widow and the minority of the grandchildren, the adult daughters, including the claimant in this case, derived no legal benefit from the homestead, and that if the object was also to set apart an exemption for their benefit during their dependency, the petition to the ordinary showed upon its face that he was without jurisdiction to grant such relief. It is contended by counsel for ²⁰⁸ the claimant that the homestead continues so long as any female for whose benefit it was set apart lives and remains single; and the case of *Gresham v. Johnson*, 70 Ga. 631, is relied on to sustain this contention. The expression of the court in that case, that, "if females are members of a family for whose benefit the homestead is set apart, the property remains exempt from levy and sale so long as one of them lives and remains single," is purely obiter. It will be seen from a report of the facts in that case that when the exemption in question was made the family of the applicant consisted only of himself and one minor son. At the date of the levy of the execution the son had arrived at majority. It was there decided that the homestead was at an end, and subject to levy and sale. In that case no right of females as beneficiaries of the homestead was in any manner involved. The decision in *Hall v. Matthews*, 68 Ga. 490, is not at all in conflict with our ruling

in this case. There a homestead was taken by one as head of a family consisting of his wife and a minor female grandchild, who lived with him and was dependent on him. It was simply decided that the death of the wife did not terminate the homestead estate, but it continued so long as the minor grandchild remained so dependent. A later case directly in point is *Vornberg v. Owens*, 88 Ga. 237, above cited. In that case a homestead was set apart to the head of a family consisting of himself and four minor children. The mother and father had died, and the children had arrived at age. The property was levied on under a fieri facias against the head of the family, and was claimed by one of the children who was still living on the land and depending upon it for support. It was held by the court that, after arriving at full age, the fact that she was still a dependent female would not extend the duration of the homestead estate beyond the death of the head of the family and his wife, and beyond the arrival at majority of all the children.

Judgment reversed.

All the justices concurring.

HOMESTEAD FOR WIDOW AND CHILDREN—TERMINATION OF.—A widow, as the head of a family, consisting of herself and minor children, is entitled to a homestead out of her own estate or that of her husband: *Note to Wike v. Garner*, 70 Am. St. Rep. 112. That a homestead exemption allowed to children terminates when they attain their majority, see *Cofer v. Scroggins*, 98 Ala. 342, 39 Am. St. Rep. 54.

McELVEEN v. SOUTHERN RAILWAY COMPANY.

[109 Georgia, 249.]

EVIDENCE—VARYING CONTRACT BY PAROL.—A BILL OF LADING, except as to the acknowledgment of the receipt of the goods, and of their quantity and condition when received, is a written contract which cannot be varied by parol evidence.

BILLS OF LADING.—ALL ORAL NEGOTIATIONS AND REPRESENTATIONS, not only as to the terms and conditions on which goods are received, but also as to the route by which they are to be forwarded, are conclusively presumed to be merged in the bill of lading, which will be received as the sole evidence of the agreement between the parties.

BILLS OF LADING—COMPLIANCE WITH—CONNECTING CARRIERS—RAILWAYS AND STEAMERS.—If a bill of lading provides for the transportation of freight, such as fruit trees, by an initial railway carrier to a certain place, and its delivery there, in good order, to a connecting railway, "or steamer," to be forwarded to its destination, the contract of carriage is complied with when the railway company delivers the freight to a connecting line of steamers at such place, whereby it is transported, ready for delivery, to the consignee. Hence, under a statute making it the duty of the initial carrier, on notice, to trace goods lost, where there are connecting lines, the consignor has no right of action against the initial carrier for a failure to trace the freight, for it has not, in fact, been lost at all. The consignee should have inquired of the water carrier for the freight.

Action for damages.

J. J. Rogers, S. N. Woodward, and Alexander & Lambdin, for the plaintiffs.

C. E. Battle and E. F. Dupree, for the defendant.

²⁵⁰ LITTLE, J. McElveen & Hardage instituted an action against the Southern Railway Company. One part of the petition clearly shows that it was sought to recover the value of certain goods shipped by them, under the provisions of sections 2317 and 2318 of the Civil Code, making it the duty of the initial carrier, on notice, to trace lost, damaged, or destroyed goods, when, in order to reach destination, the freight must be transported by two or more common carriers of a connecting line. The defendant filed a demurrer, which the court sustained, to a part of the petition, leaving the case to proceed as an action to recover for a failure to trace the goods. It appears from the brief of evidence that the plaintiffs in error, on November 5, 1897, delivered to the defendant company at Concord, in Pike county, a number of fruit trees consigned to Gilham, Fort Gaines, Georgia, for which they received a bill of lading. One of the consignors testified that, previously to and after the issuing of the bill of lading, the agent of the railroad company at Concord told him that the boats were not running between Columbus and Fort Gaines, and he would not bill the trees by boat from Columbus for that reason. It was also shown that the other of the consignors, on November 15, 1897, went to the railroad depot in Fort Gaines, Georgia, and called for the trees, and was notified that they had never arrived. The trees were subsequently found in the river warehouse in ²⁵¹ Fort Gaines, Georgia, and had never been called for there, nor at the wharf of the

steamboats running to Fort Gaines. It also appears, from a letter in evidence, that the trees arrived at Fort Gaines by boat from Columbus on the 15th or 16th of November. It was also shown that the defendant company, on the 15th of November and subsequently thereto, was notified by the consignors that the trees were lost, and it was asked that they be traced, to which notice and request no response was made. It was further shown that the trees should have been in good condition on the 16th of November. The bill of lading was introduced in evidence. It acknowledged the receipt of two boxes of fruit trees consigned to C. W. Gilham, Fort Gaines, Georgia, to be shipped by the defendant railroad company from Concord to Columbus, Georgia. It was an ordinary contract of affreightment, containing a stipulation that the goods were to be transported as specified, and at the end of the initial carrier's line to be delivered to the agents of connecting railroad companies or steamers, to be again so delivered until they should arrive at the place named as the point of destination in the bill of lading. At the conclusion of the evidence, the defendant moved for a nonsuit, which was granted, and the plaintiffs excepted. Defendant also, being dissatisfied with certain rulings of the court, filed a cross-bill of exceptions. The two writs of error were heard together in this court, and will be here considered and disposed of together. It is difficult to determine, from an examination of the seventh and tenth paragraphs of the petition as originally filed, whether by the allegations made in those paragraphs it was sought to recover damages from the defendant railroad company for a breach of duty in failing to transport the goods within a reasonable time, or for the loss of the goods in transit, or for a diversion of the freight from a specified route of shipment. Being thus confused, it was not error to strike these paragraphs on demurrer made thereto. The other allegations made set out a cause of action, and the case was properly allowed to proceed as an action to recover the damages prescribed by law for a failure on the part of the initial carrier to trace goods which had been lost en route to the point of destination.

²⁵² The plaintiffs complain because the court at the conclusion of their evidence granted a nonsuit. The position taken is, that by agreement with the railroad company, when the goods arrived at Columbus, which was a terminus of the defendant's railroad, they were to be delivered to another railroad line for the purpose of being transported to Fort Gaines,

and that they, therefore, were under no duty to seek the trees at the warehouse of a water carrier in Fort Gaines, and that when they inquired at the railroad depot in Fort Gaines and found that the trees had not arrived by rail, they were in fact lost as to the consignors, and it was the duty of the defendant company, on notice of loss and a request to trace the trees, to do so; that they had no right to expect that they would be delivered to a steamer at Columbus, and that such a delivery was a violation of the contract, and, notwithstanding the trees had in fact been transported to Fort Gaines by steamer, they were not chargeable with any laches in their failure to discover the fact until after they had become worthless by being kept out of the ground. It therefore becomes important to ascertain what was the contract of carriage. McElveen, one of the consignors who shipped the goods for his firm, testified that on the day the trees were shipped he had a conversation in Concord with the railroad agent. He had a similar conversation before and after a delivery of the bill of lading. In these conversations the agent stated that boats were not running between Columbus and Fort Gaines, and that he would not bill the trees by boat on that account. McElveen also testified that he accepted the bill of lading as the contract between the railway company and his firm as to the shipment of the trees. If it be contended that this evidence supports a theory which would entitle the plaintiffs in error to recover because of a contract subsequent to the issuance of the bill of lading that the trees should reach Fort Gaines by rail and not by boat, it will be seen that that theory is not supported by this evidence, because it is shown that the trees were shipped on the day of the issuance of the bill of lading, and it would be too late then for the railroad agent to have billed the goods by any route, as they must necessarily have already been billed; and, fairly interpreted, the evidence ²⁵³ in relation to what the agent said as to the route by which he would bill the goods must have occurred prior to the issuance of the bill of lading, and so interpreted, it is entirely consistent with the other evidence that the agent should have stated after the shipment that the trees would go by rail and not by boat. Such statements could become no part of the contract of shipment, because the trees had already been shipped; and if these subsequent statements are to be relied on as furnishing a right of recovery, then they must be treated as a misrepresentation of the route by which the goods were

shipped, rather than any part of a contract stipulating as to the route by which the trees would be shipped. As this action is not brought to recover because of such misrepresentation, but is confined to a claim for failure to trace the goods, it is not necessary to discuss the legal effect of such misrepresentations, if any were made. So, therefore, to determine whether there was error in granting the nonsuit under the allegations made in this case, it is only necessary to ascertain the terms of the contract as to the route by which the goods would be forwarded after reaching the terminus of the defendant company. The evidence, as before set out, shows that before the issuance of the bill of lading the agent of the railroad company told the owner of the trees that they would not be carried by boat from Columbus, because at that time the boats were not running. But the bill of lading thereafter issued, in terms, provides for the transportation of the trees by the initial carrier to Columbus and the delivery in good order there to a connecting railroad or steamer, to be forwarded to destination. Confessedly, the literal terms of the bill of lading were complied with, inasmuch as the goods were transported to Columbus and there delivered to a line of steamers which reached Fort Gaines by the Chattahoochee river. As a matter of fact, the goods were transported by river and delivered at the wharf or warehouse of the steamer, subject to the order of the consignee. There can be no question that the stipulations contained in the bill of lading must govern. These instruments are written contracts.

In the case of *Central R. R. Co. v. Hasselkus*, 91 Ga. 385, 44 Am. St. Rep. 37, our present chief justice said, in delivering the opinion of this ²⁵⁴ court, that: "The office of a bill of lading is to embody the contract of carriage, as well as to evidence the receipt of the goods; and when the shipper accepts it without objection before the goods have been shipped, and permits the carrier to act upon it by proceeding with the shipment, it is to be presumed that he has accepted it as containing the contract, and that he has assented to its terms." To the same effect, also, see *Western etc. R. R. Co. v. Ohio Valley Banking etc. Co.*, 107 Ga. 512. Mr. Hutchinson in his *Law of Carriers*, section 126, in referring to this class of contracts, says: "Except, however, in the recital or acknowledgment of the receipt of the goods and of their quantity and condition when received, bills of lading are strictly written

contracts between the parties, and come within the general rule which prohibits the introduction of parol evidence to contradict or vary such contracts." From these rules it must follow, as a corollary, that if no mistake or fraud is charged in the execution of the contract, it will be conclusively presumed that all oral negotiations and representations, not only as to the terms and conditions on which the goods were received, but also as to the route by which they are to be forwarded, are merged in the bill of lading, which will be received as the sole evidence of the agreement between the parties: *Snow v. Indiana etc. Ry. Co.*, 109 Ind. 422. See, also, *Richmond etc. R. R. Co. v. Shomo*, 90 Ga. 498; *Bedell v. Richmond etc. R. R. Co.*, 94 Ga. 22. The bill of lading, then, must in this case be taken as the evidence of the contract between the parties, and by its terms the contract of carriage was complied with when the railroad company delivered the goods to the connecting water carrier at Columbus. It must follow that the plaintiffs could not assume that the goods were lost on November 15th, when they inquired for them from the railroad agent in Fort Gaines and found that they had never reached that point by rail. It appears as a matter of fact that at that time the goods were being transported by the connecting water carrier, and on the 15th or 16th of November reached Fort Gaines and were ready for delivery to the consignee. Inasmuch as the contract authorized the shipment by the water route, it was the duty of the consignee to inquire for his goods from that carrier. The goods were not ²⁵⁵ lost at all, and, not being so, the consignor had no right to require the initial carrier to trace them. These facts appear from the evidence of the plaintiffs, and under it they had no right of recovery, and a nonsuit was properly awarded. It must not be understood that we intend in any way to qualify the application of section 2276 of the Civil Code. That section declares that a common carrier may not limit his liability by any notice given either by publication or by entry on receipts given or tickets sold. He may do so by an express contract. Where the effect of any notice or entry made on a bill of lading is to limit the legal liability of the carrier, and the contract embodied in such bill of lading has not been expressly assented to by the consignor, such a provision is void. This statute does not at all conflict with what we have above said. In the case at bar, the liability of the carrier for the

value of the goods, for their prompt and safe delivery, is in no way limited. This being so, the doctrine that a written contract cannot be varied by parol evidence governs.

A cross-bill was filed by the defendant below, alleging certain rulings of the judge to be error, and raising the question of the constitutionality of the act under which the suit was brought, as codified in section 2317 of the Civil Code. But under the rule established by this court, that where the judgment complained of in the original bill of exceptions is affirmed the cross-bill will not usually be considered, the cross-bill is dismissed.

Judgment on main bill of exceptions affirmed; cross-bill of exceptions dismissed.

All the justices concurring.

BILLS OF LADING—PAROL EVIDENCE TO VARY.—A bill of lading must be taken as the sole evidence of the final agreement of the parties, and, where it exists, parol evidence is inadmissible either to show a delivery of the goods or a contract for their carriage: *Tallassee Falls Mfg. Co. v. Western Ry.*, 117 Ala. 520, 67 Am. St. Rep. 179.

BILLS OF LADING—MERGER OF PRIOR AND CONTEMPORANEOUS AGREEMENTS.—A bill of lading is both a receipt and a contract. As a contract, in which the carrier agrees to transport and deliver the goods to the consignee upon the terms and conditions specified in the instrument, it is a merger of prior and contemporaneous agreements of the parties, and, being in writing, cannot be explained, nor its legal effect changed, by parol evidence, in the absence of fraud or mistake: *Morganton Mfg. Co. v. Ohio etc. Ry. Co.*, 121 N. C. 514, 61 Am. St. Rep. 679.

JOSSEY v. RUSHIN.

[109 Georgia, 319.]

NEGOTIABLE INSTRUMENTS — INDORSEMENT OF NON-NEGOTIABLE INSTRUMENT—EFFECT OF.—A payee of a non-negotiable instrument does not, by merely writing his name on the back of it, become liable thereon as an indorser; but if such writing is accompanied by a promise, made upon a valuable consideration, to pay the face value of the paper, it may be enforced against him.

Petition for certiorari.

Simeon Blue, for the plaintiff.

319 SIMMONS, C. J. It appears from the record that Rushin, the sheriff of Marion county, obtained an order from

the judge of the superior court on the county treasurer for his insolvent costs in certain cases, tried in that court. It further appears that he sold this order to Jossey for eighty-five per cent of the face value thereof. Jossey presented the order to the county treasurer on two different occasions, who refused to pay it for the want of funds. Jossey brought suit against Rushin in the county court of said county, and alleged in his petition "that it was understood and agreed verbally at the time of said indorsement that said Rushin was and is liable for the aforesaid sum, with interest." It was also alleged that at the time of the indorsement there were no funds in the county treasury, nor had there been up to the time of the filing of the suit. Rushin filed a demurrer to the petition, upon the several grounds mentioned therein, which are not necessary to be here set out. This demurrer was sustained by the county judge. Whereupon plaintiff presented a petition to the superior court of said county for a certiorari, alleging as error the sustaining of the demurrer by the county judge. The court refused to sanction the petition, and he excepts and brings the case here for review.

The law seems to be well settled that if a payee of a non-negotiable instrument merely writes his name on the back thereof, he is not liable as indorser thereon. It seems also to be well settled by the weight of authority that if he induces the transferee to purchase such non-negotiable instrument, and transfers or indorses the same to the transferee by writing his name ³²⁰ thereon in blank, and receives valuable consideration therefor, the transferee may recover of him the amount which the instrument calls for, or, at least, the amount which the transferee paid him therefor: *Shaffstall v. McDaniel*, 152 Pa. St. 598; *Cromwell v. Hewlitt*, 40 N. Y. 491, 100 Am. Dec. 527; *Frevall v. Fitch*, 5 Whart. 325, 34 Am. Dec. 558, 4 Am. & Eng. Ency. of Law, 2d ed., 480. We think, therefore, that if Jossey can establish, at the trial before the jury, to their satisfaction, the fact alleged in his petition, he would be entitled to recover. If, upon the other hand, Rushin can prove to the satisfaction of the jury that he made no such promise, but only wrote his name on the back of the order for the purpose of assigning the title to Jossey to enable him to collect it out of the county treasurer, he would be entitled to a verdict. We think that it is a question of fact for the jury; and inasmuch as Rushin admitted the allegation in the petition that he agreed to pay it, the judge of the county court

erred in sustaining the demurrer, and the judge of the superior court erred in not sanctioning the petition for certiorari.

Judgment reversed.

All the justices concurring.

NON-NEGOTIABLE PAPER—EFFECT OF PAYEE'S WRITING HIS NAME ON THE BACK OF IT.—The indorsement of a non-negotiable promissory note is equivalent to the execution of a new note, and the liability of the indorser is not contingent upon due presentation to the maker, and notice of nonpayment: *Hall v. Monohan*, 6 Iowa, 216, 71 Am. Dec. 404, and note. The writer is liable as a maker of the note or a guarantor of its payment: *Note to Cromwell v. Hewitt*, 100 Am. Dec. 528. An indorser of a town order, void because issued without authority, is answerable to his indorsee, in an action for money had and received, for the amount paid by the latter to the former therefor: *Furgerson v. Staples*, 82 Me. 169, 17 Am. St. Rep. 470.

BIRCH v. ANTHONY.

[109 Georgia, 349.]

A CONTRACT TO PROMOTE A DISSOLUTION OF A MARRIAGE is contrary to the policy of the law, illegal and void. Hence, a contract whereby a wife, who has resolved to leave her husband, agrees, for a stated consideration, to relinquish all claims on him as wife, provided a divorce is granted to him on or before a fixed date, is void, and is no bar, after his death, of her right to a year's support and dower.

Petition for injunction.

Dessau, Harris & Birch and W. H. Harris, for the plaintiff.

Harris, Thomas & Glawson, for the defendants.

349 FISH, J. W. B. Birch, as executor of the will of E. R. Anthony, brought his equitable petition against Mrs. Belle Anthony, the widow of his testator, and others, in which he sought, by injunction, to prevent Mrs. Anthony from obtaining a year's support and dower from the estate of her deceased husband, upon the ground that she had entered into the following contract with her husband:

"Having positively determined to leave my husband, E. R. Anthony, and deny him all marital rights whatever, I hereby in consideration of four hundred dollars (\$400) this day paid

me by him I relinquish all claims of any kind whatever I have on him as wife.

"Witness my hand and seal this day of , 1894.

"Legal

[L. S.]

"Providing this is a divorce granted said Anthony by 1st of April, 1895.

MRS. F. B. ANTHONY.

"DAVID MILNE.

"ISABELLA MILNE."

It appeared from the evidence that David Milne and Isabella Milne signed the instrument as witnesses.

The trial judge refused to grant the injunction, and the executor excepted. While there were several points made in the case, we think it necessary to deal with only one of them, and that is, whether the contract above set forth barred the widow's rights to a year's support and dower. It was contended by counsel for plaintiff in error that the four hundred dollars ³⁵⁰ mentioned in the contract was paid, upon the separation between Anthony and his wife, as permanent alimony, and that she was, therefore, not entitled to a year's support or to dower, as under our law, in a case of voluntary separation, the husband may voluntarily by deed make an adequate provision for the support and maintenance of his wife, and thus bar her right to permanent alimony and any further interest in his estate in her right as wife. This contention might possibly be sound but for a part of the contract which, in our opinion, renders the whole of it illegal and void.

Whatever else may have been contemplated by the parties to this contract, it manifestly appears that it was their intention to promote a dissolution of the marriage relation existing between them. By reference to the contract, it will be seen that it was apparently complete and ready to be signed when the condition was added providing, in effect, that it should be legal if a divorce should be granted to the husband on or before a fixed date. This provision renders the whole contract illegal, as it is well settled that a contract intended to promote a dissolution of marriage is contrary to the policy of the law, illegal and void: 2 Am. & Eng. Ency. of Law, 2d ed., 127; 9 Am. & Eng. Ency. of Law, 1st ed., 920; 1 Bishop on Marriage and Divorce, sec. 76; 2 Bishop on Marriage and Divorce, sec. 696; Adams v. Adams, 25 Minn. 72; Weeks v. Hill, 38 N. H. 199; Everhart v. Puckett, 73 Ind. 409; Sayles v. Sayles, 21 N. H. 312, 53 Am. Dec. 208; Goodwin v. Goodwin, 4 Day,

343; *Cross v. Cross*, 58 N. H. 373; *Muckenbarg v. Holler*, 29 Ind. 139, 92 Am. Dec. 345; *Hamilton v. Hamilton*, 89 Ill. 349; *Phillips v. Thorp*, 10 Or. 494. In *Sayles v. Sayles*, 21 N. H. 312, 53 Am. Dec. 208, Wood, J., said: "The object of the agreement was to bring about a dissolution of the marriage contract, and to put an end to the various duties and relations resulting from it. Any contract having any such purpose, object, and tendency, cannot be, in law, sustained, but must be regarded as being against sound public policy, and consequently illegal and void. The marriage relation is one to be encouraged and maintained when formed. Such is the well-settled policy of the law, and its dissolution or determination is not to be left to depend upon the caprice of the parties. If determined, it must be done in accordance with some positive enactment of ³⁵¹ law, and in due course of judicial proceedings." We cannot see that it matters at whose instance the proviso was added to the contract between Anthony and his wife, or that it was, as claimed by the plaintiff in error, impossible for the divorce to have been obtained within the time specified therein, as the illegality of the proviso entered into and permeated the whole contract and rendered it void. It follows, therefore, that such an illegal and void contract could be no bar to Mrs. Anthony's right to a year's support, or her right to dower, out of the estate of her deceased husband; and that there was no error in refusing to grant the injunction.

Judgment affirmed.

All the justices concurring.

CONTRACTS TO FACILITATE DISSOLUTION OF MARRIAGE—INVALIDITY OF.—A contract having for its object the dissolution of the marriage relation is against public policy, illegal, and void: *Sayles v. Sayles*, 21 N. H. 312, 53 Am. Dec. 208, and note.

CENTRAL OF GEORGIA RAILWAY CO. v. BRINSON.

[109 Georgia, 354.]

ATTACHMENT—GARNISHMENT OF DEBT—JURISDICTION.—A court has no power to render a judgment condemning a debt, in a garnishment proceeding, where the situs of the debt is not within the jurisdiction of the court.

ATTACHMENT—GARNISHMENT—SITUS OF DEBT.—A judgment debt due and payable in another state to a creditor, who is a resident of that state, is not subject to garnishment in this state, as the situs of the debt is not within the jurisdiction of the court.

Little & Burts, for the plaintiff in error.

J. H. Martin and W. H. McCrory, for the defendants in error.

³⁵⁴ COBB, J. Tony Tarver, Sr., a resident of the state of Alabama, owed Brinson & Ingram, residents of Muscogee county, Georgia, a debt which was contracted in that county and state and was to be paid there. They instituted proceedings by attachment, in a justice's court of Muscogee county, against Tarver as a nonresident, and on October 4, 1897, without having served him personally, caused summons of garnishment to be served upon the Central of Georgia Railway Company, seeking to condemn a debt due by that company to Tarver on a judgment which the latter had recovered on September 22, 1897, in the circuit court of Russell county, Alabama. This judgment was affirmed by the supreme court of Alabama in the fall of 1898, and thereafter Brinson & Ingram took judgment by default against Tarver in the attachment proceeding in the superior court of Muscogee county, to which the garnishment and the attachment proceedings had been by consent appealed. The Central of Georgia Railway Company is a corporation created and existing under the laws of this state, but operates lines of railway in the state of Alabama by its permission, one of which lines extends through the county of Russell ³⁵⁵ in that state. After the affirmance of the judgment against it recovered by Tarver in Alabama, the railway company paid to Tarver the amount of such judgment. On the trial of the garnishment proceeding it was agreed that the only issue to be heard and determined by the court was whether or not the debt represented by the judgment which was recovered by Tarver against the railway company in Ala-

bama was subject to the process of garnishment served upon it in this case. The judge decided that it was, and the railway company excepted.

It is a necessary prerequisite to the rendition of a judgment in a garnishment proceeding condemning a debt that the situs of the debt should be within the jurisdiction of the court. The question as to what is the situs of a debt in a given instance has become involved in some confusion by the numerous decisions upon this point. Mr. Rood, in his work on Garnishment, lays down the rule, which seems to be supported by numerous decisions, that, "Wherever the garnishee could be sued by the defendant for the demand, he may be charged as garnishee on account of it": Rood on Garnishment, sec. 245, and cases cited. On the other hand a large number of cases hold that the situs of a debt is the place where the debt is due and payable, which is impliedly the residence of the creditor: 2 Shinn on Attachment and Guaranty, sec. 626, and cases cited; Waples on Attachment and Guaranty, sec. 100. See, also, the able opinion of Mr. Chief Justice Brickell of the supreme court of Alabama, in the case of Louisville etc. R. R. Co. v. Nash, 118 Ala. 477, 72 Am. St. Rep. 181, and the authorities therein referred to. While this court has never held that this was the only rule for determining the situs of a debt, it applied this test in the cases of Kyle v. Montgomery, 73 Ga. 337, and Wells v. East Tennessee etc. R. R. Co., 74 Ga. 548. In the latter case it appeared that Wells resided in Tennessee, and the railroad company was indebted to him for labor performed in that state. His creditor sued out in this state an attachment proceeding against him as a nonresident, and garnished the railway company. The company answered that it owed Wells for services performed wholly in Tennessee, that he had brought suit in that state to recover the amount due him for these services, and that, notwithstanding it had pleaded the pendency of the garnishment ³⁵⁶ proceeding, he had recovered judgment against it. While it appeared that the railroad company was acting under charters from each of the states through which its road passed, it was dealt with as constituting but one corporation; and it was held that the garnishment proceeding could not be maintained, because the debtor had neither effects nor a debt due to its creditor in this state, nor had he any effects on which an attachment could be levied or to which the jurisdiction of the courts of this state

could attach. In the opinion Justice Hall distinguishes the case of *Kyle v. Montgomery*, 73 Ga. 337, saying that in that case "the defendant in attachment rendered service to a Georgia corporation under a contract entered into and wholly performed here. The debt was due to him from a party in this state over whom our courts had jurisdiction; he had effects here subject to attachment for his debts. In the case at bar, however, the very foundation for the attachment is wanting; the debtor has neither effects nor a debt due to him from the garnishee in this state; he has not and never had here any effects on which an attachment could be levied; there is nothing to which the jurisdiction of our courts could attach." It follows necessarily from this decision that the superior court of Muscogee county was without jurisdiction to render a judgment against the plaintiff in error in the present case.

Judgment reversed.

All the justices concurring.

GARNISHMENT—SITUS OF DEBT—JURISDICTION.—To subject property to garnishment, it must be within the jurisdiction of the court: Note to Louisville etc. R. R. Co. v. Nash, 72 Am. St. Rep. 188. That garnishment proceedings must be instituted in the state where the debt is payable, and that a garnishment in one state of a debt due and payable in another is void, see the notes to *Balk v. Harris*, 70 Am. St. Rep. 609; *Morawetz v. Sun Ins. Office*, 65 Am. St. Rep. 47, where other views are given. Compare the monographic note to *National Bank v. Furtick*, 69 Am. St. Rep. 113, discussing the situs of debts for the purposes of garnishment.

HENDERSON v. HEYWARD.

[109 Georgia, 373.]

INTOXICATING LIQUORS—RIGHT TO OWN, THOUGH SALE IS PROHIBITED.—The fact that the sale of alcoholic liquor is prohibited in a designated portion of the state does not destroy the right of a person to own such an article within the prohibited territory.

MUNICIPAL CORPORATIONS—PURCHASE OF INTOXICATING LIQUORS—PENAL ORDINANCE.—A city cannot, without express legislative authority so to do, pass any ordinance making penal the buying of alcoholic liquor from one lawfully authorized to sell it.

MUNICIPAL CORPORATIONS—PURCHASE OF INTOXICATING LIQUORS.—The "general welfare" clause of a city charter does not authorize the passage of an ordinance prohibiting the

purchase of spirituous liquor, or interfering with the right to receive it after a purchase from one who was lawfully authorized to sell.

MUNICIPAL CORPORATIONS—RECEPTION OF INTOXICATING LIQUORS—INTERFERENCE WITH—VOID ORDINANCE.—A city ordinance, passed without express charter authority, and which makes it penal for one who has lawfully purchased alcoholic liquor without the city limits to receive it therein, without paying a specific tax of a given amount for the privilege of so doing, is void for want of municipal authority to pass it, although the sale of such liquor, within the city, is prohibited. The city has no power, under the "general welfare" clause of its charter, to pass such an ordinance.

HABEAS CORPUS—VOID CITY ORDINANCE.—A person held in custody for violating a void city ordinance is entitled to be discharged on a writ of habeas corpus.

John W. Akin, for the plaintiff in error.

James B. Conyers and Bennett J. Conyers, for the defendant in error.

374 COBB, J. Heyward was arrested under a warrant charging him with the violation of an ordinance passed by the municipal authorities of the city of Cartersville, of which the following is a copy:

"Whereas, this being a prohibition city and county by a vote of the people, and, after their best efforts to protect themselves from the curse of intoxicants, the shipment of vinous, malt, and distilled liquors continue to be made into our community, to the injury and detriment of the morals, good order, prosperity, and general welfare of this community, and should be prevented or controlled; therefore the mayor and aldermen of the city of Cartersville, in the exercise of the general welfare, police, and other powers vested in them by the laws and the charter of the said city, and to accomplish the purposes heretofore enumerated, do enact and ordain as follows:

"Section 1. That on and after the fourth day of March, 1899, it shall be unlawful for any person or persons, corporation or company, to receive from any common carrier or person any package, jug, demijohn, or bottle of vinous, malt, or distilled liquors in said city, until he, she, or they have paid a specific tax of five dollars on each gallon or fraction thereof. Said specific tax must be paid to the treasurer of the city, and a receipt of the treasurer must be presented to any common carrier or person before the delivery of such packages of intoxicants.

"Sec. 2. Be it further ordained by the authority aforesaid that any person or persons, company or corporation, who shall receive or have delivered to them any package or packages of distilled, vinous, or malt liquors, without first procuring and exhibiting the receipt of the treasurer for the specific tax on such package or packages of intoxicants aforesaid, shall, on conviction thereof, pay for each violation of this ordinance a fine of fifty dollars or be worked thirty days in the chain-gang of the city, either or both at the discretion of the court.

"Sec. 3. Be it further ordained that any express company, railroad company, or other carrier, public or private, or ³⁷⁵ any agent or employé thereof, who shall deliver to any person in said city any of the packages hereinbefore enumerated, without having produced to such carrier the receipt from the treasurer hereinbefore provided for, shall also be subject to the same penalties prescribed herein for violation of this ordinance.

"Sec. 4. Provided, that this ordinance shall not apply to the bringing and delivery, by one citizen of said city, to another citizen of said city, of not exceeding one quart of spirituous liquors for medicinal purposes, to be furnished only upon the prescription of a sober, reputable physician that the same is necessary and to be used for medical purposes only."

Section 5 repeals conflicting laws.

While in custody Heyward applied to the judge of the city court of Cartersville for a writ of habeas corpus, alleging in his petition that the ordinance which he was charged with having violated was invalid, for the reason that the municipal authorities had no power to pass the same, and that therefore he was held in illegal custody. Upon the return of the writ a hearing was had, and a judgment rendered discharging the petitioner from custody, on the ground that the ordinance was void. To this judgment the marshal excepted.

Counsel for plaintiff in error did not expressly concede that the ordinance in question could not be upheld as an exercise either of the taxing or license power of the municipal authorities of Cartersville, but his entire argument was directed to the establishment of the proposition that the passage of the ordinance was a legitimate exercise of the police power. If we regard the amount required by the ordinance to be paid, as a condition precedent to the reception and delivery of the liquors therein enumerated, as a tax upon property, it must fail as such; for it is neither *ad valorem* nor uniform. Nor can it be regarded as a specific tax or the imposition of a sum in the

nature of a license fee, because under its charter the city of Cartersville has authority to impose such a tax or license fee only upon an occupation or business, and the buying of a single vessel containing whisky certainly cannot be properly regarded as an occupation or business. We pass, therefore, to a discussion of the question as to whether the ordinance can be upheld as a valid exercise of the police power of the municipality.

³⁷⁶ It is conceded that the authorities had no express charter authority to pass the ordinance in question; but it is contended that it had the power under the general welfare clause of its charter, which is in the following language: "The mayor and aldermen shall have power to pass all ordinances that they may consider necessary to the peace, good order, health, prosperity, comfort, and security of the city and the citizens thereof, not inconsistent with the constitution and laws of this state and of the United States." The police power of a state may be exercised by the general assembly directly, or indirectly through the medium of the subordinate public corporations of the state. It may be that the state would have a right to prohibit the purchase of whisky. That the state has a right to prohibit absolutely the sale of whisky is no longer an open question, either in this court or in the supreme court of the United States: *Perdue v. Ellis*, 18 Ga. 586; *Hill v. Dalton*, 72 Ga. 314; *Mugler v. Kansas*, 123 U. S. 623. None of the decisions of this court, however, go to the extent of holding that a law prohibiting the sale of liquor in a designated territory has the effect of destroying entirely all property right in alcoholic liquors which may be brought into such territory. On the contrary, it has been expressly held that the fact that the sale of liquor was prohibited in a designated part of the territory of the state does not destroy the right of a person to own such an article within such territory: *Fears v. State*, 102 Ga. 274.

It may be contended with great force that if the state, notwithstanding it recognized a property right in alcoholic liquors, can, under its police power, entirely destroy the right of the owner of such liquors to sell or dispose of the same within the limits of the state, which would, in some instances, be a practical confiscation of the property, it has the power to declare that no person shall by purchase come into possession of such property within the limits of the state. Laws prohibiting the sale of whisky are upheld as constitutional upon the ground that its sale is against the best interests of the public at large,

and is a business which, if not inherently evil, is of such a nature that its presence is a constant menace to the peace and ³⁷⁷ good order of society, as well as the welfare of individuals. If this be true, it would seem to follow that the state might enact any law which would effectually prohibit the traffic. A law prohibiting the sale would, if effectually enforced, prohibit the buying; and so also the prohibition of the purchase would likewise prohibit the sale. The prohibition of the sale, therefore, puts a ban upon the entire traffic. Of course, a law making penal the sale would not, without more, make penal the buying; but the practical effect of such a law, if enforced, would be to prohibit the buying. It would seem to follow, therefore, that the state might go further than it has already gone, and make penal the buying. But be this as it may, we are clear that a municipal corporation cannot, without express legislative authority so to do, pass any ordinance making penal the buying of alcoholic liquors from one lawfully authorized to sell the same. It may be laid down as a general rule that, in addition to its express powers, a municipal corporation can only exercise those which are necessarily or fairly implied in or incident to its express powers, and those that are indispensable to the declared objects and purposes for which the corporation was created: 1 Dillon on Municipal Corporations, sec. 89. The power to pass a law making penal the purchase of intoxicating liquors is certainly not indispensable to the purpose for which the city of Cartersville was incorporated; there is no express grant of authority to this effect; and hence the power is wanting, unless it can be implied from its general welfare clause above quoted. A municipal corporation has no power to adopt ordinances for the prohibition or regulation of the sale of liquors, unless expressly authorized to do so, or unless such ordinances fairly and legitimately fall within the scope of the powers conferred upon them in general terms: Black on Intoxicating Liquors, sec. 220. As an instance of the strictness with which the powers of municipal corporations over the subject of liquors have been construed, see Hill v. Decatur, 22 Ga. 203. In that case, notwithstanding it appeared that the commissioners of the town of Decatur had authority "to restrict, prohibit, and regulate the sale, vending, and distribution" of intoxicating liquors, "provided no license to retail spirituous liquors shall exceed fifty ³⁷⁸ dollars," it was held that the commissioners had no power to prohibit absolutely the sale of liquor, and that they had authority only to grant a

license upon the payment of a fee not exceeding fifty dollars. In *Sanders v. Commissioners*, 30 Ga. 679, it was held that the power "to regulate the rates of tavern licenses" does not confer the power to grant licenses; there being in existence a different system of issuing such licenses. It was further ruled that the power to grant tavern licenses was not embraced in a general clause of a town charter conferring upon it the power of general legislation for itself, Judge Stephens assigning as a reason for the latter ruling that: "The courts will not infer that the legislature intends to authorize a local departure from a general policy of the state, unless the local exception is expressed in specific terms."

In the case of *Mayor etc. v. Putnam*, 103 Ga. 110, 68 Am. St. Rep. 80, it was held that neither the general welfare clause usually found in municipal charters, nor the special power "to license and regulate the management of barrooms, saloons," etc., includes the power to establish and operate under municipal agency a dispensary for the sale of spirituous and malt liquors. This decision was made at a time when it could not be said to have been against the general legislative policy to operate dispensaries; for a number were being operated in the state under direct sanction of the general assembly. But the court construed the grant of power strictly, and said that a dispensary was neither a barroom nor a saloon in legislative contemplation. If the general welfare clause of a municipal charter would not authorize the city authorities to establish and operate a dispensary as a means of regulating and restricting the sale of liquors, it is difficult to see upon what principle such a clause would authorize the passage of an ordinance prohibiting the purchase of such liquors, or interfering with the right to receive the same after a purchase from one who was lawfully authorized to sell. The one would be no less a regulation than the other. It would seem, therefore, to follow from these decisions that municipal corporations would not, without express legislative sanction, have authority to prohibit either the selling or buying of intoxicating liquors within their ^{own} limits. They may, of course, regulate to a certain extent the traffic in such liquors, but even then their powers, under the decisions above referred to, are not very broad under the usual general welfare clauses found in municipal charters. If the rule is so strict as regards the sale of whisky, which the general assembly has seen fit to deal with as being within the police power of the state, and which under the settled public

therefore, in ordering that the petitioner be discharged from custody.

Judgment affirmed.

All the justices concurring.

INTOXICATING LIQUORS—PROHIBITION AGAINST KEEPING—POLICE POWER.—The keeping of liquors in his possession by a person, whether for himself or another, unless he does so for the illegal sale thereof, or for some other improper purpose, cannot injure or affect the health, morals, or safety of the public. Hence, a statute prohibiting such keeping in possession, even in local option territory, and attempting to make it a crime, is not a legitimate exercise of the police power, but is an abridgment of the privileges and immunities of the citizen, without any legal justification, and therefore void: *Ex parte Brown*, 38 Tex. Cr. Rep. 295, 70 Am. St. Rep. 743.

MUNICIPAL CORPORATIONS—POWERS OF—"GENERAL WELFARE" CLAUSE OF CHARTER.—A municipal corporation can exercise only the powers given it by the legislature: *Mauldin v. Greenville*, 42 S. C. 283, 46 Am. St. Rep. 723. Its powers are confined to those expressly granted, or those essential to their execution: *Notes to Detroit etc. Ry. Co. v. Detroit*, 64 Am. St. Rep. 359; *Champer v. Greencastle*, 46 Am. St. Rep. 402. It has no power, under the "general welfare" clause of its charter to make it unlawful to carry on a lawful trade or business in a lawful manner: *Cosgrove v. Augusta*, 103 Ga. 835, 68 Am. St. Rep. 149.

HABEAS CORPUS.—THE VIOLATION OF A VOID MUNICIPAL ORDINANCE is not a criminal offense: *State v. Webber*, 107 N. C. 962, 22 Am. St. Rep. 920; and, if one is imprisoned therefor, he is entitled to discharge on habeas corpus: *Ex parte Smith*, 135 Mo. 223, 58 Am. St. Rep. 576.

ROBINSON v. STATE.

[109 Georgia, 561.]

EMBEZZLEMENT BY PUBLIC OFFICERS—ELEMENTS NECESSARY FOR CONVICTION.—To authorize the conviction of a public officer for embezzlement, it must be shown that the accused is a public officer, or occupies a fiduciary relation; that the money or property which he is charged with appropriating to his own use came into his possession by virtue of his office or employment; and that he embezzled or fraudulently converted it to his own use.

EMBEZZLEMENT BY PUBLIC OFFICERS.—EVIDENCE of a mere failure, on the part of a public officer, to pay over funds coming into his hands, is not sufficient to support a conviction for a fraudulent appropriation thereof. There must be other evidence from which it may be legitimately inferred that such failure was either in contemplation of a misappropriation, or was the consequence thereof. The guilty intent must be shown.

J. O. Adams, F. M. Johnson, and H. H. Dean, for the plaintiff in error.

W. A. Charters, solicitor general, and W. F. Findley, for the defendant in error.

⁵⁶⁴ LITTLE, J. Robinson was indicted and tried for the offense of embezzlement. The bill of indictment alleges that, as tax collector of Hall county, he embezzled money belonging to the county, to the amount of eight thousand four hundred and one dollars, collected of the taxpayers on the general county tax due on the digests of the county for the years 1890, 1891, and 1892. A second count alleges that he embezzled money belonging to Hall county, to the amount of seven thousand two hundred and seventy-three dollars, being taxes collected from the different railroads located in said county. He was convicted, and made a motion for a new trial on a number of grounds, the first three of which may be summarized to be that the verdict is without evidence and is contrary to law. Several were added by amendment, ⁵⁶⁵ but, in view of the ruling we make on the general grounds of the motion, it is entirely unnecessary to consider these additional grounds.

The plaintiff in error was indicted under section 187 of the Penal Code, which declares that: "Any officer, servant, or other person employed in any public department, station, or office of government of this state, or any county, town, or city thereof, who shall embezzle, steal, secrete, or fraudulently take and carry away any money, paper, book, or other property or effects, shall be punished," etc. This offense was unknown to the common law, and is entirely the creation of statutes both in England and in this country. In its nature it is near akin to larceny, the difference being that in order to constitute the latter offense the property must be taken from the actual or constructive possession of the owner. Hence it will be readily seen that the taking of property which belongs to another who has never come into possession of it, by one who acquires possession of that property in the course of business, cannot technically be classed as a larceny. The English statute constituting the offense of embezzlement was enacted because of a decision that a clerk of a banker who had received money from a customer and appropriated it to his own use could not be convicted of larceny, in consequence of the fact that the money had never been in the employer's possession: *Rex v. Bazeley*,

§ East P. C. 571. Under the definition of the offense of embezzlement given in our code, it seems that it is necessary that the appropriation shall be made of property belonging to another, or, in case of a public officer, to the public, which rightfully came into the possession of the person charged with its appropriation, and that such person cannot be convicted unless it be shown that the money has been fraudulently appropriated by the officer to his own use. The words of the statute constituting this offense afford no reason why, like other crimes, a guilty intent is not necessary to be shown. Some conflict seems to exist between the adjudicated cases on the question whether a mere neglect to pay over money which has come into the hands of the officer is sufficient evidence to make out the fact of a guilty misappropriation. Some of the ^{see} text-books lay down the proposition that a neglect or refusal to pay over the funds is sufficient evidence of misappropriation to sustain a conviction, and a number of cases are cited to sustain the text.

An examination of some of these cases convinces us that the rule thus laid down is not only unsound, but not supported as a general proposition by the authorities cited. As an instance, we are referred to the case of *Regina v. Guelder*, 8 Cox C. C. 372. It appears in that case that the person charged with embezzlement of public money obtained from the proper authorities, by fraud, receipts for given sums after he had misappropriated the funds, and then, in the audit of his accounts, furnished these receipts as vouchers. The court held that evidence of these facts was sufficient to support the conviction as against the defense relied on, that the accused had made a true and correct entry in his book of the sums at the time that he received them, and that therefore he could not be guilty of this particular offense; the fact of misappropriation was not even contested. Again, we are referred to the case of *State v. O'Kean*, 35 La. Ann. 901, where the court held that the neglect to pay over on demand is *prima facie* evidence of conversion and embezzlement; but it was so held because declared by a statute of the state of Louisiana. The same rule was held in the case of *State v. Munch*, 22 Minn. 67, but in that case also the ruling was made on a statute which declared that an improper neglect or refusal to pay over according to the provisions of law was embezzlement *per se*. In the case of *Britton v. State*, 77 Ala. 202, a similar ruling was founded on the statutes of the state, one of which declares that any tax collector who shall fail to make returns and forward the tax money in

his hands from time to time to the proper authorities, as provided by law, except for good cause, shall be guilty of embezzlement, etc. The only case to which we have been cited which clearly rules that a failure and refusal of a public officer to pay over money belonging to the county is sufficient evidence of a conversion of such money to his own use, is that of *State v. Leonard*, 6 Cold. 308. There the point was made that the mere failure and refusal to pay over was not evidence of a conversion ⁵⁰⁷ in the sense of the statute. The court held such contention to be without merit, and among other reasons given for the ruling was, that failing and refusing to deliver a chattel on demand is evidence of conversion, in the civil action of trover; and this ruling was sustained in the case of *State v. Cameron*, 3 Heisk. 78, by the same court. We cannot adopt the reasoning upon which *State v. Leonard*, 6 Cold. 308, is founded. Under our law, the evidence necessary to obtain a judgment in a civil case and that necessary to sustain a conviction in a criminal case are essentially different. As to the former, the weight of the evidence authorizes a verdict for the plaintiff, while in the latter it is necessary that the evidence shall be so strong as to leave no reasonable doubt of guilt.

But we are not left without authority to establish what is the correct rule. In the case of *Regina v. Jones*, 34 Eng. C. L. 393, it was ruled that some specific sum must be proved to be embezzled; in like manner as in larceny, some particular article must be proved to have been stolen. In the case of *Rex v. Hodgson*, 3 Car. & P. 422, where the facts showed that a clerk, whose duty it was to receive money at a stage office for passengers and parcels and remit to the head office in another town, failed to remit some of the money with which he had charged himself, it was held that a charge of embezzlement could not be sustained for the appropriation of the money which he failed to remit, the judge saying: "This is no embezzlement; it is only a default of payment. If the prisoner regularly admits the receipt of the money, the mere fact of not paying it over is not a felony. It is but matter of account." Mr. Clark, in his work on Criminal Law, 275, citing a number of authorities, says that a mere neglect to pay over funds is not sufficient to sustain the charge. Mr. Bishop, in his *New Criminal Law*, volume 2, section 376, says: "The agent's mere neglect to pay over the money is clearly insufficient." So that we find the weight of authority to be that the mere neglect or refusal to pay over funds in his hands is not sufficient to sus-

tain a conviction for a misappropriation of the fund, in the absence of a statute making such failure or refusal sufficient evidence of the fact. Under our statute, we think three things must be shown ^{see} to authorize a conviction: 1. That the accused is a public officer or occupies a fiduciary relation; 2. That the money or property which he is charged with appropriating to his own use came into his possession by virtue of his office or employment; 3. That he embezzled or fraudulently converted it to his own use. Necessarily this proof can rarely be made by directly showing the conversion; and the facts necessary to show misappropriation can only be inferentially shown. Mr. Wharton, in the first volume of his Criminal Law, section 1030, says: "The fraudulent appropriation is to be inferred from facts," citing a number of authorities in note 2. And on page 879 of the same work the author says: "Among these is the denial of the reception or the suppression of the fact of such reception. And it is usual to require, in addition to proof of reception, some proof of attempted concealment, flight, or other facts inferring fraud; among which facts the falsification of accounts is to be noticed as peculiarly significant." And he further says, on authority, that "to show this [fraud], flight, insolvency, concealment, or evasions form strong elements of proof." Mr. Bishop, in section 376 of the second volume of his Criminal Law, says, on authority, that "the common and sufficient proof is either that the servant willfully made in his books false entries, or that he denied or purposely omitted to acknowledge the receipt of the embezzled article or fund." And this court in the case of a defaulting tax collector, in construing this section, said that he must have collected some money for the county and used it for his private purposes, to be guilty of this offense: *Fuller v. State*, 73 Ga. 412.

Under the general principles of criminal law, as well as under the authorities we have cited above, as to this particular offense, we think that a public officer cannot be legally convicted of the offense of embezzlement by showing a mere refusal or neglect to pay over funds which came to his hands, but that in addition thereto there must be some evidence of other things from which it may clearly be inferable that the neglect to turn over the funds was either in contemplation of a misappropriation or was the consequence of the misappropriation. Such neglect or refusal affords sufficient grounds for a civil action to ^{see} recover the money; but when, in addition, there is proof that the officer falsified his accounts, that he

was guilty of evasions in explaining his default, that he fled, or other acts indicating guilt, a case is sufficiently made to put the defendant on explanation, and if not satisfactorily explained, a conviction may be upheld. But without some similar evidence, neither the misappropriation nor the guilty intent is sufficiently shown. In the present case it appears that the plaintiff in error was liable for a much larger sum of money belonging to the county than he had paid over; and while the proof seems to be conclusive that he was a careless and entirely incompetent officer, it does not necessarily show that he was a dishonest one. There can be no question that he issued executions for a considerable portion of the general tax; that these executions were placed in the hands of collecting officers. Some of these officers paid at different times different sums of money, on account of these executions, to the county treasurer. It inferentially appears that others did not. The matter seems, from the record, to be in some confusion; the evidence as to the amount of the general tax which the plaintiff in error actually collected is not made plain, nor sufficiently so to be a basis for a conviction. To sustain the second count in the indictment it was clearly shown that a certain portion of the railroad tax due to Hall county was collected by the plaintiff in error; but he contends that that amount so collected was paid over to the county treasurer, and the treasurer's evidence shows that, while no particular amount was paid to him as railroad taxes, he did receive from the accused at different times considerable sums of money. It does not appear that the accused fled the county, that he rendered false statements, or made such evasions in rendering his accounts as to sufficiently indicate that he had secreted the money of the county, or willfully appropriated any portion of it to his own use. Indeed, outside of certain specific amounts received from different railroads, the evidence is unsatisfactory as to what amounts actually went into his hands. The charge of embezzlement must be made out under the rules of the law which obtain in the prosecution for the commission of other crimes. The same presumptions exist in favor of the person ³⁷⁰ on trial; and taking this evidence as a whole, we are of the opinion that it was insufficient to warrant the conviction of the accused.

Judgment reversed.

All the justices concurring.

EMBEZZLEMENT BY PUBLIC OFFICERS.—THE MERE FAILURE or refusal of a public officer to pay over to the proper office a sum found due from him upon a settlement is *prima facie* evidence of a conversion, but the crime of embezzlement is not committed unless he has converted the money to his own use, or otherwise misapplied it. Hence, a public officer, prosecuted for embezzlement, may introduce evidence relieving his failure or refusal to pay over money in his hands of its felonious intent: See monographic note to *Calkins v. State*, 98 Am. Dec. 169, on embezzlement.

CONLEY v. REDWINE.

[109 Georgia, 640.]

EXECUTIONS—SHERIFF'S SALE—NOTICE OF—WHEN INSUFFICIENT.—Under a law providing that notices of all sales by a sheriff "shall be published weekly for four weeks," and that there must be "one insertion each week for each of the four weeks immediately preceding" the day when the sale is to take place, an execution sale is not properly advertised where there are not four insertions in four consecutive weeks immediately preceding the week in which the sale takes place. The publication is insufficient if the last one is made in the same week as that in which the sale is to be had.

EXECUTIONS—SHERIFF'S SALE—DEFECT IN ADVERTISING—VALIDITY OF SALE.—A failure to advertise a sheriff's sale on execution for the length of time prescribed by law is a mere irregularity, and does not affect the validity of such a sale made to an innocent purchaser, having no notice of the defect, although he is the plaintiff in execution.

EXECUTIONS—VOID SALE AS OBSTACLE TO VALID SALE.—A void sale under a dormant execution presents no obstacle to a sale of the same property under a valid execution. It is not necessary that the void sale be set aside by a direct proceeding before another sale is had.

INSTRUCTIONS—WHEN NOT PREJUDICIAL—HISTORY OF LITIGATION.—It is not prejudicial for a judge to inform the jury as to the history of a protracted litigation, if it is derived from the pleadings in the case and from uncontradicted evidence, and the judge refers to it only so far as it is necessary to enable the jury to understand the issues involved in the present case.

EXECUTIONS—SALES EN MASSE.—Land in a body, but made up of contiguous parcels composed of fractional parts of different land lots, may be levied upon as a whole and sold as one tract, particularly where the owner has treated the property as one tract, so far as the land lot lines are concerned.

EXECUTIONS—MISCONDUCT IN DETERRING BIDDERS AT SALE—EFFECT OF, ON RIGHT TO ATTACK SALE.—A person who is interested in whatever surplus there may be from the proceeds of an execution sale, after the payment of the execution, should not be prejudiced by the misconduct of a stranger in deterring bidders and depressing the price of the property, but if such

interested person co-operates with the stranger in such misconduct, this would prevent him from attacking the sale on the ground that the property did not bring its full value.

EXECUTIONS — DETERRING BIDDERS AT SALE — WHAT IS NO CAUSE FOR SETTING SALE ASIDE.—If no one is actually deterred from bidding at an execution sale, the mere fact that a principal and his agent bid against each other thereat is no cause for setting the sale aside, whatever their intention may have been.

NEW TRIAL—MATTERS OF ORATORY—DISCRETION OF COURT.—All matters of oratory are necessarily left to the sound discretion of the trial judge, and his ruling concerning them will not justify the granting of a new trial where no abuse of discretion appears.

EXECUTIONS—SALE OF MORE PROPERTY THAN DEFENDANT OWNS—VALIDITY—WHO CANNOT COMPLAIN.—A defendant in execution, or one claiming under him, cannot complain that an execution sale is void on the ground that the levy and sale embraced more property than the defendant owned.

EXECUTIONS—SALE EN MASSE OF LAND WITHIN CORPORATE LIMITS.—Although the owners of land within the limits of an incorporated town have caused a map thereof to be made, on which streets and lots of the usual size appear, yet if there is evidence from which the jury may find that the streets and town lots have not been actually laid out over the property, that the same is really one tract and used as such, and that the only thing in the nature of a street through it is a recognized public road of the county, a levy of execution upon, and sale of, the property as a whole is not illegal.

EXECUTIONS — SALES ON — INSUFFICIENT DESCRIPTION IN LEVY—HOW CURED.—An entry of levy which embraces in general terms a description of a tract of land levied on, and refers for a more accurate description to a public record, is sufficient if the public record accurately describes the property; and this is true although the description might be insufficient to locate the property in the absence of the record.

Equitable petition.

A. A. Manning and T. P. Westmoreland, for the plaintiffs in error.

Arnold & Arnold and Rosser & Carter, for the defendants in error.

443 **COBB, J.** This case brings under review another phase of a controversy which has been before this court in various shapes and at several different times: See *Conley v. Thornton*, 81 Ga. 154; *Conley v. State*, 83 Ga. 496; *Conley v. State*, 85 Ga. 348; *Conley v. Maher*, 93 Ga. 781; *Conley v. Arnold*, 93 Ga. 823; *Conley v. Buck*, 100 Ga. 187; *Conley v. Buck*, 102 Ga. 752; *Conley v. Redwine*, 103 Ga. 569. The history of the litigation in all of its phases leading up to the present controversy will be found in the cases cited above, and it is un-

necessary to repeat it here. The pleadings in the present case brought before the court two sheriff's sales of the same property. The first was had under an execution in favor of D. P. Hill, as executor of Wade Hill, against John L. Conley, and the second was under an execution in favor of Thornton, then controlled by Buck, against John L. Conley. Redwine, the original plaintiff and the purchaser at the second sale, brought his petition praying that the first sale be set aside. The wife of John L. Conley, who claimed the property under a deed from her husband, was a defendant in this proceeding, and she by answer in the nature of a cross-bill set up that she was the purchaser under the first sale and prayed that the same be confirmed and that the sale to Redwine be set aside. At the trial it was conceded that the first sale was void, and therefore the only question for decision was whether the second sale was valid. The trial resulted in a verdict in favor of Redwine, and Mrs. Conley's motion for a new trial being overruled, she excepted.

1. It was insisted that the sheriff's sale at which Redwine became the purchaser was void, because the sale was not advertised according to law. The advertisement was published four times in the newspaper, to wit, on Monday, March 15th, Monday, March 22d, Monday, March 29th, and Monday, April 5th. The sale was had on Tuesday, April 6th. Section 5457 of the Civil Code provides that notices of all sales by the sheriff shall be published weekly for four weeks; and section 5458, which embodies an act passed in 1891, provides that it shall be sufficient and legal to publish the notice "once a week for four weeks (that is, one insertion each week for each of the four weeks) immediately preceding the day when the sale is to take place; ⁶⁴³ and the number of days between the date of the first publication, and the day when the sale [is] to take place, whether more or less than thirty days, shall not in any manner invalidate or render irregular the advertisement or order of sale." Prior to the passage of the act of 1891, when the law required sheriff's sales to be advertised for four weeks, it was held that the word "week" meant a period of time consisting of seven days, and that to comply with the law it was necessary that twenty-eight days should elapse between the date of the first advertisement and the date of the sale; and that this lapse of time was sufficient whether four complete calendar weeks were embraced therein or not: *Boyd v. McFarlin*, 58 Ga. 208; *Bird v. Burgsteiner*, 100

Ch. 486. As was said by Mr. Justice Little in the opinion in the case last cited: "This was the law, as construed at the time the act of 1891 was passed, and that act was intended to change existing law, so that if a notice of such sale should be made once a week for four weeks, such advertisement would be sufficient, without reference to the number of days which might so elapse. In ascertaining the legislative intent as expressed by the act, we are bound to conclude also that the week of seven days was not intended to be taken as the period in which one publication only of the notice must necessarily be made, because such was the statute as interpreted by the court at the time of the passage of the act; hence the act, in referring to the publication to be made once a week for four weeks, means a calendar week, and if notice shall be made on any day of a calendar week, that shall be counted as a publication for that week," etc. That the act of 1891 intended that the notice in any one calendar week should be a notice for the week is undoubtedly true, but this was not all that that act required. The notice must be at some time in the week, and there must be four calendar weeks in each of which there is a publication of the notice of sale preceding the day of sale. The act declares in terms that there must be "one insertion each week for each of the four weeks immediately preceding" the day when the sale is to take place. The week in which the sale takes place is certainly not a week "preceding" the day on which the sale takes place; and it would therefore follow that the notice published in such week ⁶⁴⁴ could not be counted as one of the four insertions necessary to a compliance with the statute. Under this construction of the law a period of at least twenty-four days must elapse between the date of the first insertion and the date of the sale. If the first insertion is on Saturday, and the subsequent insertions on any given day of the three following weeks, the period of twenty-four days elapses between the two. To illustrate: If a sale was to take place on Tuesday, February 6th, the first notice would have to be inserted on Saturday, January 13th. Insertions January 13th, 20th, 27th, and February 3d would be a compliance with the law. If an insertion on a day embraced within the week of sale was allowable, a sale could be had after the lapse of seventeen days from the first insertion. For instance, if a sale was to take place on February 6th, insertions could be made on January 20th, 27th, February 3d and 5th. Such is

not our understanding of the law. It appears in *Bird v. Burgsteiner*, 100 Ga. 486, that twenty-six days elapsed between the first insertion and the date of sale, and that there were four calendar weeks preceding the day of sale, in each of which notice of the sale had been published. The question now under consideration was not involved at all in that case, and any language in the opinion which conflicts with what we now rule is, therefore, not binding as authority.

2. If what has been said is a correct construction of the act of 1891, it follows that the sale at which Redwine was the purchaser was not properly advertised, for the reason that there were not four insertions in four consecutive weeks immediately preceding the week in which the sale took place. The next question to be considered is, whether or not this defect was such as to render the sale void; or simply an irregularity which would not affect the title of the purchaser, who had no actual notice of the same. In the case of *Sullivan v. Hernden*, 11 Ga. 294, it was held that if the sheriff has authority to sell property, a failure in the performance of any duty, for which he would be compelled to indemnify the owner for the injury received, would not destroy the title of an innocent purchaser. In *Brooks v. Rooney*, 11 Ga. 423, 56 Am. Dec. 430, it was ruled that the purchaser at a sheriff's sale depends upon the "judgment, the levy, and the deed; all other questions are between parties to the ⁶⁴³ judgment and the officer"; it being sufficient for the purchaser that the sheriff had obtained authority to sell and had executed to him a title. It was further ruled in that case that an act which made it the duty of the sheriff to advertise the sale of property in a particular way and to sell between certain hours of the day was merely directory to the officer; the effect of his neglect being to subject him to a suit for damages at the instance of the party injured, but not to affect the title of the purchaser, unless there was collusion between him and the sheriff. Also, that a purchaser at a sheriff's sale has a right to presume that a public officer, known to possess the power to sell, has taken every previous step required of him by the law under which he sells. To the same effect are the following: *Hendrick v. Davis*, 27 Ga. 167, 73 Am. Dec. 726; *Johnson v. Reese*, 28 Ga. 353, 73 Am. Dec. 757. See, also, in this connection, *Johnson v. Reese*, 31 Ga. 601; *Solomon v. Peters*, 37 Ga. 251, 92 Am. Dec. 69; *Wallace v. Trustees*, 52 Ga. 167; *Jeffries v. Bartlett*, 75 Ga. 230; *Maddox v. Sullivan*, 2 Rich. Eq. 4, 44 Am. Dec. 234; *Burton v. Spiera*,

92 N. C. 503; Frink v. Roe, 70 Cal. 296; Ware v. Bradford, 2 Ala., N. S., 676, 36 Am. Dec. 427; 12 Am. & Eng. Ency. of Law, 1st ed., 210, note 6. Mr. Freeman, in his work on Executions, says: "Concerning execution sales, on the other hand, and in the absence of any statute establishing a rule upon the subject there are some dicta and a few decisions indicating that the existence of a notice of sale is essential to its validity. But a very decided preponderance of the authorities maintains this proposition: that the statutes requiring notice of the sale to be given are directory merely, and that the failure to give such notice cannot avoid the sale against any purchaser not himself in fault": 2 Freeman on Executions, sec. 286, p. 953. The rule is thus stated in the Civil Code: "The purchaser at judicial sales is not bound to look to the appropriation of the proceeds of the sale, nor to the returns made by the officer, nor is he required to see that the officer has complied fully with all those regulations prescribed in such cases. All such irregularities create questions and liabilities between the officer and parties interested in the sale. The innocent purchaser is bound only to see that the officer has competent authority to sell, and that he is apparently proceeding to sell under the prescribed forms": 648 Civ. Code, sec. 5455. It is therefore the settled law of this state that a defect in the advertisement is a mere irregularity and does not affect the validity of a sheriff's sale made to an innocent purchaser. This does not conflict with the ruling made in the case of Williams v. Barlow, 49 Ga. 530. In that case the property was advertised for the December sales, and was not sold until the first Tuesday in January. No other inference can be drawn from the language of Chief Justice Warner in that case than that the purchaser knew at the time of the sale that the property had not been advertised according to law. Neither is the case of Ansley v. Wilson, 50 Ga. 418, in conflict with the present ruling, for the reason that that was a municipal tax sale and the requirements of the charter had not been complied with. The same is true of the case of Sawyer v. Cargile, 72 Ga. 290. But even conceding, for the sake of the argument, that the three cases just cited are in conflict with those cited above, the earlier decisions, never having been brought under review and expressly overruled, are controlling notwithstanding the subsequent contradictory rulings.

The next question to be considered is, whether the plaintiff in execution can, when he has no actual notice of the ir-

regularity, he said to occupy the position of an innocent purchaser. This question is answered by the ruling made in the case of *Humphrey v. McGill*, 59 Ga. 649, where it was ruled: "Where a plaintiff in fieri facias purchases at the sale of property under his execution, he stands upon the same footing as any other purchaser, in respect to irregularities of the sheriff in levying, advertising, and selling. If he purchases without notice of these irregularities, he acquires a good title." Rulings to the same effect were made by the supreme court of New York and the court of appeals of that state: *Wood v. Moorhouse*, 1 Lana. 405; 45 N. Y. 368. The sale in the present case was not void, therefore, whether we treat Redwine as purchasing in his individual capacity or as agent for Arnold and Buck; there being no evidence in the record that this irregularity was known to Arnold, Buck, Redwine, or Curran, the agent of Redwine who made the bid. The case of *Forbes v. Hall*, 102 Ga. 47, 66 Am. St. Rep. 152, is not in conflict with this ruling. While the purchaser there was the ⁶⁴⁷ attorney for the plaintiff in execution, the sale was not declared void on account of any irregularity, but for the reason that the levy was excessive and therefore void. Such a levy is no authority to sell, and therefore it is immaterial who is the purchaser; he gets no title.

3. The sale under the execution of D. P. Hill was void for the reason that the execution was dormant; and counsel for Mrs. Conley contended in the court below, as well as in this court, that as the sale was made under the forms of law, it was, although void, such an obstacle to another sale that it should be set aside by a direct proceeding before another sale could be had. This contention cannot be maintained. A void sale is no sale, and can never be an obstacle in the way of a legal sale. The plaintiffs in execution in the second sale had no connection with the void sale, and did not bring it about for the purpose of deterring bidders and affecting the price of the property at their sale; and hence under no view of the case did it present any obstacle to the consummation of that sale: See *Davis v. Comer*, 108 Ga. 117, 75 Am. St. Rep. 33.

4. Complaint is made that the judge erred in giving to the jury in his charge a history of the litigation prior to the present trial, between Thornton, Buck, and Maher on the one side, and John L. Conley on the other. It appears from a note by the judge to the ground of the motion containing this assignment of error, that this history was derived from the pleadings

in the case and from uncontradicted evidence, and that he referred to the same only so far as it was necessary to enable the jury to understand the issues involved in the present case. In the light of the judge's note it cannot be said that the charge complained of in any way prejudiced the rights of the defendants.

5. The land levied upon was in one body made up of contiguous parcels composed of fractional parts of different land lots. We do not think that the fact that the tract was divided by the lines of the land lots would interfere with the right of the sheriff to levy upon the property as a whole and treat the same as one entire tract. Especially would this be true in the present case, where the jury were authorized from the evidence before them to find that the owner had treated the property as one tract so far as the land lot lines were concerned.

⁶⁴⁸ 6. Mrs. Conley was interested in the sale because under the deed from her husband she was the owner of the property as to everyone else except the owner of the Thornton execution, and therefore she was interested in whatever surplus there might arise from the proceeds of the sale after the payment of that execution. At the sale under the execution of D. P. Hill, executor, against John L. Conley, the property had been bid off by Manning for Mrs. Conley. It is true that Manning testified that he was not the agent of Mrs. Conley, but was representing John L. Conley, at whose request he bid it off for Mrs. Conley. When the sale under the Thornton execution took place Manning made a statement, as he said, at the request of John L. Conley, in reference to a homestead which had been applied for in the property and to an illegality which was pending; such statement being calculated to deter persons from bidding at the sale. Mrs. Conley admits in her answer that the statement above referred to was made by her authority. These facts having appeared, the judge charged the jury as follows: "If you should believe from the evidence that this property did not bring its full value at the sale under the execution controlled by Buck, still if you believe that the inadequate price was brought about by the conduct of Mrs. Conley, or her agent or attorney, or the defendant John L. Conley, in deterring bidders by making announcements or statements, publicly in the hearing of prospective bidders, that the property was covered by a homestead, if in fact there was no homestead, or that an illegality was pending, if such illegality

was not pending, or that the levy under the execution controlled by Buck had not been sufficiently advertised, if in fact it had been lawfully advertised, or other like conduct, then I charge you that Mrs. Conley can take no advantage of the fact that the property did not bring its full value." The error assigned on this charge is, that the judge declared that Mrs. Conley was bound by the statements made by John L. Conley, when the evidence showed that he had long before the sale parted with the title.

If John L. Conley was the agent of Mrs. Conley at the time the sale took place (and there was evidence from which the jury might infer that such was the case), of course she would be bound by what he said; but the complaint is made that the judge leaves the impression upon the minds of the jury that although he was not her agent she would still be bound by what he said. If he was a stranger, of course her rights should not be affected by what he said or did. Yet, as it appears that Manning, who had bid the property in at the first sale for Mrs. Conley, and whose right to do so does not appear up to the present time to have been impeached by her, made the statement above referred to, and as the evidence shows that John L. Conley and Manning were in apparent co-operation with each other, there was evidence from which the jury could have inferred that Manning was the agent or attorney of Mrs. Conley in making the statements at the second sale, and she admits that such statements were made by her authority. This co-operation with John L. Conley in attempting to deter bidders and depress the price of the property would prevent Mrs. Conley from attacking the sale on account of the mere misconduct of Conley, even if he was a stranger only and not her agent in any way. In this view of the matter there was nothing in the charge of the court which was prejudicial to the defendants.

7. From the evidence it appeared that at the sale under the Thornton execution there were only three bids, one thousand dollars by Redwine, fifteen hundred dollars by Arnold, and two thousand dollars by Redwine, at which amount the property was knocked down to Redwine. As it appeared that at the time Redwine was the agent of Buck and Arnold, it is contended that the manner of the bidding was such an irregularity as would be ground for setting aside the sale. It is insisted that the last two bids were for such amounts as to deter other persons from bidding, and were so intended, and that

this proceeding, if nothing else, would have been sufficient for the jury to have returned a verdict setting aside the sale. Upon this subject the court charged the jury as follows: "As to what would be a conspiracy to lessen or deter bidding, the court charges that the fact, if it be a fact, that two persons may bid together for land at a sheriff's sale, or upon joint account, or upon a mutual understanding that they will buy together, does not alone constitute such a prevention of bidding as would make the sale void. Persons have a right to bid together at a ~~also~~ sheriff's sale, provided they do no act which is fraudulent or which tends to deter other persons from bidding or to depreciate the sale or price brought at the sale. The fact that property may be purchased by one person for another and that both persons may be present at the sale cannot alone invalidate the sale or make it void on that account." This charge is assigned as error, because it is claimed that counsel did not contend that there was any conspiracy to deter bidders, and that the court failed to charge that the bidding in large amounts might be considered by the jury; and if the amount of each bid was such as to deter bidders, this would be a reason for setting aside the sale. In a note to the ground of the motion for a new trial in which this assignment of error is contained the judge says: "It was contended that the conduct of Arnold, Redwine, or Curran at the sale, and their bidding and acting as the evidence showed, was a ground for setting aside the sale, whether counsel used the word 'conspiracy' or not. It could not have been submitted to the jury merely whether it was strange. There was no request to charge on this subject." There was no error in the charge as given, nor was there any error in the failure to charge as complained of by the defendant. Let it be conceded that the conduct of Arnold and Redwine was such as to deter bidders desiring to purchase the property which was to be sold, such conduct would not be a sufficient ground for setting aside the sale, unless it was shown that there was at the sale a person or persons who would have, but for this conduct, become bidders for the property, and that by reason of this arrangement they were actually deterred from participating in the bidding. As the evidence does not disclose that anyone was actually deterred from bidding in the present case, the conduct of Arnold and Redwine, no matter what their intention may have been, did not prejudice the rights of Mrs. Conley.

8. Complaint is made that the court erred in requiring counsel for defendant to refrain from making certain remarks of a pathetic nature in reference to the widow of John L. Conley, who was present in court, it being claimed that such remarks were not inappropriate as a reply to the vigorous assault which had been made on the life and character of Conley by opposite ⁵⁵¹ counsel. We cannot say that in the remarks objected to counsel exceeded the bounds of legitimate pathos, but as all matters of oratory are necessarily left to the sound discretion of the trial judge, we do not feel justified in holding that the conduct of the judge on this occasion was such an abuse of discretion as to require the granting of a new trial.

9. It was contended that because the levy embraced a certain parcel of land which it was admitted was not subject to the execution, the sale was void. We do not see how the defendant in execution, or one claiming under him, can complain of this. The only effect of embracing in the levy and sale more property than the defendant owned would be to increase the proceeds of the sale, and to this extent benefit both the owner of the property which was being sold, and one entitled to the balance of the proceeds of the sale after the execution had been satisfied.

10. It was further contended that the property levied on was embraced within the limits of an incorporated town, that it had been subdivided into streets and town lots, and that for this reason the levy upon the property as a whole was illegal. It appears from the evidence that the owners of the property had caused a map to be made of the same, upon which appeared streets and lots the usual size of town lots; but there was abundant evidence from which the jury could find that the streets and town lots had not been actually laid out over the property, but that the same was really one tract of land, used as such, and the only thing in the nature of a street through it was a recognized public road of the county. The judge's charge fairly submitted these questions to the jury, and the evidence was sufficient to authorize them to find against the contention of the defendant. As there is nothing in the answer of the defendant complaining of the sale on the ground that the same was defective for the reasons referred to in this and the preceding division of this opinion, even if the position taken by the defendant's counsel in this court be correct, it would avail nothing in the present case.

11. One ground upon which the sale to Redwine was attacked was an insufficient description of the property in the levy. The levy described the property as being in the fourteenth district of ⁴⁵² Fulton county, Georgia, and being parts of land lots 163 and 164, being north half of land lot 163, containing one hundred and one and one-quarter acres, and being the southeast quarter of land lot 164, containing fifty-two acres, more or less, the same being the property described in the deed dated August 16, 1884, from John L. Conley to his wife, and being described also in the petition of A. E. Buck against John L. Conley and wife, heretofore described, suit 1806, fall term, 1894, Fulton superior court, and being the property found subject in said suit. The levy was dated March 15, 1897. It was contended that this levy did not describe the property so that the same could be identified and located, and therefore the public was not put on notice of what property was being sold. It is not claimed that the description of the property in the deed from John L. Conley to his wife or in the petition in the case of Buck v. Conley and wife was not sufficient to identify and locate the property, but it is contended that a levy is not valid which does not in itself, unaided by extrinsic evidence, disclose an accurate description of the property levied on. An entry of levy which embraces in general terms a description of a tract of land levied on and refers for a more accurate description to a public record is sufficient if the public record accurately describes the property; and this is true notwithstanding the fact that the description might be insufficient to locate the property in the absence of the record: See, in this connection, *Talmage v. Interstate etc. Assn.*, 105 Ga. 550; *Cedartown Imp. Co. v. Cherokee Imp. Co.*, 99 Ga. 122; *Hoffman v. Anthony*, 6 R. I. 282, 75 Am. Dec. 701, and note on page 706. The levy in the present case, so far as the description of the property was concerned, was sufficient, and there was no error in so holding.

12. We have given the voluminous record in present case a careful investigation, and the foregoing opinion deals with all of the questions raised which, in our opinion, are of such a character as requires discussion at length. The charge of the court was full, fair, and explicit in every particular; and if any error requiring the granting of a new trial was committed during the entire progress of the case, we have been unable to discover it. The evidence fully authorized the verdict

rendered ^{ess} on all of the contested issues of fact, and there was no error in denying a new trial.

Judgment affirmed.

'All the justices concurring.

EXECUTIONS—SALES—ADVERTISEMENT.—Under a statute requiring a sheriff's sale to be advertised "once a week during three successive weeks," an advertisement in each of three successive weeks is sufficient, although it may not have been published on the same day of every week, and there may not have been twenty-one full days between the first advertisement and the day of sale: *Holmister v. Vanderlin*, 165 Pa. St. 248, 44 Am. St. Rep. 657. That a publication for a certain number of weeks must be made for as many days before the day of sale as there are days in the number of weeks required, see the monographic note to *Hoffman v. Anthony*, 75 Am. Dec. 708, on what is a proper and sufficient notice of sale.

EXECUTION SALES—DEFECTIVE NOTICE—VALIDITY OF SALE.—Statutes requiring notice of an execution or judicial sale are directory merely, and the failure to give such notice cannot avoid the sale against any purchaser not himself in fault: See monographic note to *Maddox v. Sullivan*, 44 Am. Dec. 239, on the failure to advertise an execution or judicial sale. A sheriff's failure to advertise land more than twenty days, when the statute requires twenty-one, does not invalidate a sale made by him: *Maddox v. Sullivan*, 2 Rich. Eq. 4, 44 Am. Dec. 234.

EXECUTION SALES OF PROPERTY EN MASSE—VALIDITY OF.—A sale of property en masse, under execution, is not ipso facto void, and will not be set aside unless it is shown that a larger sum would have been realized from the sale if the property had been sold in parcels, or that a sale of less than the whole tract would have brought sufficient to satisfy the execution: *Hudepohl v. Liberty Hill etc. Min. Co.*, 94 Cal. 588, 28 Am. St. Rep. 149, and note. Compare the note to *Anniston Pipe Works v. Williams*, 54 Am. St. Rep. 56.

EXECUTION SALES—DETERRING BIDDERS.—An agreement as to bidding at a sheriff's sale is not fraudulent, if it does not prevent competition at such sale, or depress the price: *Braden v. O'Neil*, 183 Pa. St. 462, 63 Am. St. Rep. 761. See, also, *Smith v. Greenlee*, 2 Dev. 126, 18 Am. Dec. 564. To render a sale under execution fraudulent, there must have been a conspiracy to depress the bidding: *Stewart v. Severance*, 43 Mo. 322, 97 Am. Dec. 392.

EXECUTION SALES—DESCRIPTION—REFERENCE TO RECORD.—A description of land in the levy of an execution is sufficiently certain if it can be made so by reference to a record: *Gillman v. Thompson*, 11 Vt. 643, 34 Am. Dec. 714; and see note to *Hoffman v. Anthony*, 75 Am. Dec. 708.

CASES
IN THE
APPELLATE COURT
OF
INDIANA.

ROWE v. RAPER.

[23 Indiana Appeals, 27.]

PARENT AND CHILD.—THE FUNERAL EXPENSES of a minor child are not a charge against his estate where he leaves a father surviving him who is able to pay them.

J. W. Noel and F. J. Lahr, for the appellant.

Wilborn Wilson, for the appellees.

27 COMSTOCK, C. J. Charles E. Raper, a minor, died in March, 1896. In June of the same year, letters of administration on his estate were issued to the Marion Trust Company. The claim in suit is for funeral expenses due the undertaker who officiated at the burial of the deceased, and which appellee claims to own by virtue of an assignment.

In July, 1896, the undertaker brought suit for this claim against the father of the deceased; the cause was put at issue but was not tried, and, in February, 1897, was dismissed as "compromised and settled." The assignment of the claim to appellant bears date March 16, 1897. Upon application, appellant, in whose favor a claim for medical services rendered the deceased had been allowed by the court against the estate, was made a party defendant for the purpose of resisting appellee's claim. The trial resulted in a judgment for the amount claimed in favor of appellee. The administrator, not joining in the appeal, was made an appellee.

The only error assigned is the overruling of the motion for a new trial. The first reason set out in the motion is that the finding of the court is contrary to the law. The second that it is contrary to the evidence. The third that it is contrary to the law and the evidence. These grounds are discussed together in the brief of counsel.

The deceased left surviving him a father. The claimant was his stepmother. It is insisted by appellant that the funeral ²⁸ expenses, which are the foundation of the claim, are not a charge against the estate. This position is supported by authorities. From the many authorities holding that it is the duty of the parent to provide for the necessities of life of his minor children, we cite the following: *Kinsey v. State*, 98 Ind. 351; *Haase v. Roehrscheid*, 6 Ind. 66; *State v. Clark*, 16 Ind. 97; *Myers v. State*, 45 Ind. 160; *Corbaley v. State*, 81 Ind. 62; *State v. Roche*, 91 Ind. 406; *Lenskies v. Kerr* (Tex. Civ. App., March 4, 1896), 34 S. W. Rep. 766; *Moore v. Moore* (Tex. Civ. App., May 1, 1895), 31 S. W. Rep. 532; *Cooper v. McNamara*, 92 Iowa, 243; *Field on Parent and Child*, sec. 54. *Schouler on Domestic Relations* says at section 242a: "A father is, in general, liable for the decent funeral expenses of his deceased minor child": Citing *Bair v. Robinson*, 108 Pa. St. 247, 56 Am. Rep. 198; *Sullivan v. Horner*, 41 N. J. Eq. 299. The foregoing is the general rule. When the parent has not property of his own to support his minor child, resort may be had to the property of the child for such purpose, but such condition must first be made to appear before such resort can be had: *Corbaley v. State*, 81 Ind. 62; *State v. Roche*, 91 Ind. 406; *Rhode v. Tuten*, 34 S. C. 496. With equal reason a claim may be enforced against the estate of the minor for funeral expenses when the father is unable to pay them. It does not appear from the record that the father was not able to pay the claim in suit.

Counsel for appellees cite a number of cases to the effect that a minor is liable for the reasonable value of necessities which may have been furnished him. This exception to the general rule that an infant cannot bind himself by his contract is for the benefit of the infant himself, and not for those who give him credit. It has been decided that medical attention and articles furnished for the purposes of health may be recovered for as necessities: *Saunders v. Ott*, 1 McCord, (*572), 351; *Price v. Sanders*, 60 Ind. 310. The infant is

held on a promise implied by law and not, strictly speaking, on an actual promise: *Trainer v. Trumbull*, 141 Mass. 2^d 527. In *Chapple v. Cooper*, 13 Mees. & W. 252, an infant widow was held bound by her contract as for necessities for the funeral expenses of her husband, who left no property to be administered. An infant husband may contract for the interment of his deceased wife or children, so as to be bound by his contract. In citing the case just mentioned, Mr. Schouler in his *Domestic Relations*, at section 199, says: "The contract will have validity, because it is a contract for the burial of those who are *personae conjunctae* with him by reason of the marriage, and as such it is to be regarded as a contract for his own personal benefit."

Appellees cite *Matter of Butler*, 1 Connolly (N. Y. Surr.), 59, as holding that the estate of the minor was liable for the funeral expenses. A father died testate leaving a considerable fortune to a minor child. Upon his death, while still a minor, unmarried, and without creditors, the executor paid the funeral expenses. Upon settlement, the court held that the executor had no legal authority to make the payment, but that as it was made in good faith, and the amount reasonable, it would be equitable to allow him credit for the same in his settlement of the trust, as an administrator of the minor's estate would have been authorized to pay the same. The facts would certainly authorize the payment out of the estate. No question of the liability of the father or the solvency of the minor's estate was raised as in the cause before us.

Appellees argue that if the claim in suit is not a proper charge upon the estate, that appellant's claim is without foundation. It does not follow. We do not know what evidence was introduced in the trial of appellant's claim. It will be presumed, in the absence of a showing to the contrary, that it fully justified the judgment.

We conclude that the claim, so far as the facts are shown by the record, is not a charge upon the estate. The only cases of which we are advised in which courts have passed directly upon the question hold the father liable. Nor does it seem unreasonable that the father, having under the law ³⁰ control of the person and earnings of his minor child, should be required, when financially able, to give it suitable burial.

The remaining questions discussed relate chiefly to the assignment to appellee of the claim against the estate, upon which we are of the opinion it is not shown to be a charge,

and to other questions which may not arise upon a second trial. We do not, therefore, deem it necessary to consider them.

The judgment is reversed, with instruction to sustain the motion for a new trial.

Henley, J., absent.

PARENT AND CHILD—SUPPORT OF CHILD.—Independently of statutory enactment there is no legal obligation on a parent to maintain his minor child; *Kelly v. Davis*, 49 N. H. 176, 6 Am. Rep. 499; monographic note to *Bennett v. Gillette*, 74 Am. Dec. 779. Compare *Zilley v. Dunwiddie*, 98 Wis. 428, 67 Am. St. Rep. 820.

FUNERAL EXPENSES—LIABILITY for funeral expenses is treated in the note to *Gregory v. Hooker*, 9 Am. Dec. 652, 653. See, too, *Bair v. Robinson*, 106 Pa. St. 247, 56 Am. Rep. 198.

NORTHWESTERN MASONIC AID ASSOCIATION v. BODURTHA.

[23 Indiana Appeals, 121.]

INSURANCE—BREACH OF WARRANTY—WAIVER—PLEADING.—In an action on a life insurance policy, where, to a defense that there has been a breach of certain warranties in the insurance application as to the health of the insured and his promise not to use intoxicating liquors to excess in the future, the claimants reply that the insurance company issued the policy with full knowledge of the untruthfulness of the answers in the application, such reply merely alleges knowledge at the time of issuing the policy and is demurrable, since it fails to aver that the insurer had notice of the violation of the agreement not to use intoxicating liquors to excess, and with such notice accepted payment of premiums.

INSURANCE—EXCESSIVE USE OF LIQUOR—WAIVER BY AGENT.—Where the agents of an insurance company, authorized to solicit applications and collect premiums, continue to collect premiums from an insured with knowledge of the fact that he was using intoxicating liquors to excess, in violation of his policy, such action amounts to a waiver of the right to declare a forfeiture, notwithstanding the agents failed to communicate their knowledge to the company.

INSURANCE—FORFEITURE OF POLICY—PLEADING.—An answer which seeks to avoid an insurance policy because of false statements made by the insured in his application in regard to his health need not allege that the insurance company was imposed upon or that it believed the false statements were true, where the representations are material, the policy states that it was issued in consideration of the representations and warranties made in the application, and the policy and application are made parts of the answer.

INSURANCE—POLICY—WARRANTY.—An insurance application with answers to questions, the medical examiner's report, and an agreement, which recites that the preceding statements and answers, the application, and this agreement are made part of the policy, form a part of the insurance contract, and an agreement therein of the insured that he would abstain from the excessive use of intoxicating liquor is a promissory warranty and not the statement of an expectation.

INSURANCE—BREACH OF WARRANTY NOT TO DRINK TO EXCESS.—It is no defense to the breach of a promissory warranty in an insurance policy not to use intoxicating liquors to excess that the insurance company had knowledge at the time of issuing the policy that the insured had previously used intoxicants to excess to such an extent as to render him diseased from such dissipation.

W. C. Bailey and C. A. Cole, for the appellant.

W. E. Mowbray, R. J. Loveland, and H. P. Loveland, for the appellees.

¹²³ **COMSTOCK, J.** This action is based upon a certificate of membership or policy of life insurance issued by the appellant to Charles F. Bodurtha for the benefit of his children, who are the respective wards of appellees. The complaint was originally in three paragraphs, upon which issues were formed and evidence heard, but at the conclusion of the argument appellees were permitted to withdraw the first and third paragraphs. The issues upon which the cause was submitted to the jury were formed on the second paragraph of complaint, the answer, and reply. The trial resulted in a verdict and judgment in favor of appellees for two thousand two hundred and seventy-nine dollars.

The answer admits the execution of the policy in suit, the death of the insured, the appointment of appellees as guardians respectively of the minor children of the deceased, the furnishing of proofs of death, and the demand for the payment of the policy, but seeks to avoid the payment because of false statements, breaches of certain warranties and covenants of the insured contained in the application for insurance, made a part of the policy, as to the health of and use of intoxicating liquors by the insured. Plaintiff replied: 1. By general denial; 2. Affirmatively, that with full knowledge that the answers to the interrogatories in question were false, the association issued the policy to said Bodurtha, and accepted premiums thereon after it was known to ¹²³ its agents that he was violating his promise as to the future use of intoxicating liquor, and retained the premiums so paid.

Appellant claims, first, that the court erred in overruling its demurrer to the sixth paragraph of the reply, which paragraph is as follows: "The plaintiffs for further reply to the said defendant's answer, and to each and every paragraph thereof, say that, for the purposes of this reply, they admit all and singular the allegations of said answer and in each paragraph thereof, but say that, with full notice and knowledge of the untruthfulness of answers in the application complained of in said answers of the association, and of such other matter complained of in said several paragraphs of answer, the defendant association accepted and approved the application of the said Charles F. Bodurtha, issued and delivered to him the policy sued on, and collected the premiums due thereon at the date of said policy, and all subsequent premiums which accrued thereon before the death of said Bodurtha." It avers, also, that no part of said premium was ever returned or tendered to the said Bodurtha, or to the plaintiffs, or either of them, but is still retained by said association. This reply is addressed to all the paragraphs of the answer. It must, therefore, be good as to all to withstand a demurrer.

The defense pleaded in the several paragraphs of answer is representations and warranties of certain false statements in his application for insurance and membership in the association, to the effect that he had never had disease of the heart nor rheumatism; that he had never used intoxicating liquors to excess; that he would not thereafter use intoxicating liquors to excess, when, in fact, he had been afflicted with rheumatism and had disease of the heart, as he knew, at the time of said application; that he had been in the habit of using intoxicating liquors to excess, and that, after the issuing of the policy, he used intoxicating liquors to excess, and that his death was caused, in part, by its excessive use; that the appellant was induced to enter into the contract of insurance ¹²⁴ by reason of the false statements, representations, and promises of the insured.

The clause of the application referred to is as follows: "I further agree and warrant that I will not use intoxicating liquors to excess, nor practice any pernicious habit that obviously tends to shorten life; that if, after becoming a member of said association, I shall fail to pay any bimonthly premium or assessment on or before the day on which the same shall fall due, or fail to comply with this agreement, then, and in either event, my membership shall cease, and said cer-

tificate of membership or policy become void, and all moneys I shall have paid shall be forfeited to said association for its sole use and benefit."

The reply is pleaded as a waiver of the false representations and the breach of the promise to abstain from the excessive use of intoxicating liquors. It is claimed that in issuing the policy and accepting the premium with knowledge that the representations were untrue, appellant waived any defense on account of their falsity. This paragraph does not, however, aver that the association, after the execution of the policy, waived the breach of the promise of the insured not to use intoxicating liquors to excess, by accepting premiums after notice of such breach. The knowledge alleged to be in the possession of the association at the time of the issuance of the policy and the payment of the premium, that the representations made by the insured were false, must be held to apply to knowledge existing at those dates; it could not apply to the future conduct of the insured. To be good, the paragraph should have averred that appellant had notice of the violation of the agreement not to use intoxicating liquors to excess, and with such notice accepted payment of premiums. Construing, under the universally accepted rule of pleading, this paragraph most strongly against the pleader, such averments are wanting. The acceptance of premiums after the violation by the insured of a condition of the policy rendering it void must be ¹²⁵ with knowledge of such violation to estop the insurer to deny liability on account thereof. The insurer may be willing to assume a risk upon the life of one who has been intemperate in his habits, upon his promise to be temperate in the future. We have set out the clause in the application containing the agreement as to the future use of intoxicating liquors. By its terms, and the language of the policy, it is made a part of the contract. The policy reads: "In consideration of the representations, agreements, and warranties made in the application for this policy of insurance, which application is made a part of this contract," etc. The application contains two sets of questions to be answered by the applicant, one under "Form A," the other under "Form B." The agreement is under "Form B." Its first sentence is as follows: "I, the undersigned, hereby agree that each and all of the foregoing statements and answers in forms A and B, whether written by me or not, are material, and are warranted

to be true, and that the foregoing application and this agreement are hereby made part of any certificate of membership or policy that may be issued pursuant thereto": *Presbyterian etc. Fund v. Allen*, 106 Ind. 593; *Mutual etc. Ins. Co. v. Miller*, 39 Ind. 475. The court erred in overruling the demurrer.

Appellant next claims that the court erred in overruling its demurrer to the seventh paragraph of reply. This paragraph contains substantially the averments of the sixth, and alleges in addition that, before Bodurtha became a member of the appellant association, the insured, at the solicitation of Humerickhouse and Mills, who were agents of appellants, applied for membership in said association; that the defendant is a foreign corporation; that Humerickhouse and Mills were its only agents authorized to do business in Miami county, Indiana (in which county the insured resided), and that from that date on until after the death of the insured they continued to be its agents to solicit applications and collect premiums for said association; that, while acting as said ¹²⁶ agents, they knew that the insured was in the habit of using intoxicating liquors to excess after the date of the policy sued on, and was "at an institution for treatment for inebriety," and with knowledge of the fact that he was using intoxicating liquors to excess, and was being treated for inebriety, the association, by its agents, continued to collect for the association the premiums that accrued on the policy up to the time of his death, and have ever since retained the same.

The objection made to this paragraph is that it does not allege that the agents named communicated their knowledge to the company, or to any officer or any general agent, nor that they had authority to waive the forfeiture. It has been held in a number of cases that knowledge of the agent is knowledge of the company. In *Germania Life Ins. Co. v. Koehler*, 63 Ill. App. 188, it was held that an insurance company will be estopped from asserting a forfeiture of the policy by the knowledge of its agent of facts which would justify it in declaring the forfeiture, which right it had failed to exercise, and instead treated the policy as in full force. In the case just mentioned, the insured, in violation of the policy, had changed his residence and moved into prohibited territory without the consent of the company. Upon the trial of the cause, the court instructed the jury that if a duly authorized agent of the company received such premiums after notice of

such change of residence, and the company retained the same, then it became as much bound as if the premium had been paid directly at the home office in New York, and had been received there with a full knowledge of the change of residence; and this, regardless of whether the agent informed the company of the violation of the policy or not. The appellate court said: "The plaintiff in error contends this is not the law. Our supreme court is committed to the doctrine that such facts would constitute a waiver of the right to declare a forfeiture: *Illinois Fire Ins. Co. v. Stanton*, 57 Ill. 354; *Williamsburg etc. Ins. Co. v. Cary*, 83 Ill. 453; *North British etc. Ins. Co. v. Steiger*, 124 Ill. 81; ¹²⁷ *Phenix Ins. Co. v. Hart*, 149 Ill. 513."

Upon appeal to the supreme court the judgments of the trial and appellate courts were, in a well-reasoned opinion, approved: See *Germania Ins. Co. v. Koehler*, 168 Ill. 293, 61 Am. St. Rep. 108.

In *Newman v. Covenant Mut. Ins. Co.*, 76 Iowa, 56, 14 Am. St. Rep. 196, the policy declared on, as well as the application therefor, provided that if the insured should use alcoholic liquors so as to injure his health, the policy should be void; another clause of the policy provided that the company might cancel the policy if it found that the insured did so use alcoholic liquors. But the agent who took and forwarded the application, and who later received the premium, knew all the time that the insured was an habitual drunkard. It was held that there was a waiver of these conditions of the contract, and that the habitual drunkenness of the assured would not defeat the recovery on the policy.

Manifestly, knowledge of the agent was held to be knowledge of the company. See *Insurance Co. v. Wolff*, 95 U. S. 326, in which it was held that there was, under the facts, no waiver of the forfeiture; but the court said: "It is true that, where an agent is charged with the collection of premiums upon policies, it will be presumed that he informs the company of any circumstances coming to his knowledge affecting its liability; and, if subsequently the premiums are received by the company without objection, any forfeiture incurred will be presumed to be waived": See *Miller v. Mutual Ben. Ins. Co.*, 31 Iowa, 216, 7 Am. Rep. 122; *McEwen v. Montgomery etc. Ins. Co.*, 5 Hill, 101; *Insurance Co. v. Combs*, 19 Ind. App. 331.

The questions presented by the remaining specifications of appellant's assignment of errors may not arise upon a second trial, and we do not, therefore, consider them.

Appellees have assigned cross-errors, and we pass to their consideration. Appellees first question the sufficiency of the ¹²⁸ first paragraph of answer to the complaint. This paragraph seeks to avoid the policy because of false statements made by the assured in his application for insurance in regard to his health. It is contended that the answer fails to show that the defendant company was imposed upon by the false statements, or that it believed that they were true, and was thereby induced to execute the policy. These representations were material. The policy itself states that it was issued "in consideration of the representations, agreements, and warranties made in the application." The policy and application are made parts of this answer. It is a sufficient allegation of inducement: *Bacon on Benefit Societies*, secs. 209, 210, 212; *Jeffries v. Life Ins. Co.*, 22 Wall. 47; *Cobb v. Covenant Mut. Assn.*, 153 Mass. 176, 25 Am. St. Rep. 619. It is further claimed that this paragraph pleads a warranty and breach thereof, and that all that the warranty can be predicated upon is what is called an "agreement" attached to the application. Appellees claim that this agreement is not a part of the policy contract. The application for membership and answers to questions, the "agreement," the medical examiner's report, are all one paper, executed at the same time. The agreement is signed by the insured, the medical report following by the examiner, and the whole indorsed "Application to the Northwestern Masonic Aid Association." The agreement recites that the preceding statements and answers, and the application, and this agreement are made part of the policy. We are clearly of the opinion that the application, including the "agreement," forms a part of the insurance contract, and that the agreement of the insured that he would abstain from the excessive use of intoxicating liquor was a promissory warranty, and not, as counsel for appellees contend, the statement of an expectation. In this ruling the court did not err.

The second, third, fourth, and fifth specifications of cross-errors relate to the second, third, fourth, and fifth paragraphs ¹²⁹ of answer, and present substantially the same questions raised by the first cross-error, and what we have said with reference to the first cross-error applies to them. In these rulings there was no error.

Appellees next discuss the action of the court in sustaining the demurrer to the fifth paragraph of reply. The paragraph of answer to which this paragraph of reply is addressed pleads a promissory warranty, in that said Bodurtha, in his application for insurance, agreed and warranted that he would not use intoxicating liquors to excess, and it avers as a breach of said warranty that, after the issuing of the policy, he did use intoxicating liquors to excess until he became a physical wreck, and that such dissipation contributed to his death. The reply to this answer avers that before the date of said application, and before the issuing of the policy, the said Bodurtha had used intoxicants to excess to such an extent as to render him diseased from such dissipation, which disease affected him at the time of said application, of which fact the said association had knowledge at the time of the application, and thereafter, before the issuing and delivery of the policy; that the deceased's condition continued until his death, and his return to such dissipation was merely a recurrence of the disease, over which he had no control. Appellees' counsel quote from eminent writers on medical jurisprudence, showing that drunkenness is a disease, that it is liable to occur periodically, and argue from these facts that the company, knowing that Bodurtha was diseased, and the cause of it, having issued the policy, cannot now honestly refuse payment. We think it would be a dangerous precedent to hold that the deplorable conditions, physical and mental, which are likely to follow the immoderate use of intoxicants, should preclude business transactions with one who in the past may have been the victim of the habit, but who promises to be temperate in the future, and to release such party from the obligations of a valid contract because of his failure to keep this promise.

¹²⁰ Specifications 19, 20, and 28 of the assignment of cross-errors relate to the refusing to give and the giving of certain instructions. They are not the basis of an independent specification of error, and do not, therefore, present any question for review.

We are not unmindful of the rule that forfeitures are not favored in law, and that the insurance company is asking the enforcement of a rule which is, ordinarily, a harsh one, while it retains the premiums for which the insurance was carried. But the courts do declare forfeitures when the insurer is clearly entitled thereto. In the case before us the terms of

the contract are plain. It was deliberately made. The parties were competent to enter into it. It contravenes no rule of law, and we see no reason why it should not be enforced: *Wilcox v. Continental Ins. Co.*, 85 Wis. 193; *Wierengo v. American etc. Ins. Co.*, 98 Mich. 621; *Smith v. Columbia Ins. Co.*, 17 Pa. St. 253, 55 Am. Dec. 546; *Pennsylvania Ins. Co. v. Gottsman*, 48 Pa. St. 151, 157; *Fitchburg Sav. Bank v. Amazon Ins. Co.*, 125 Mass. 431; *Crikelair v. Citizens' Ins. Co.*, 168 Ill. 309, 61 Am. St. Rep. 119; *Northwestern Ins. Co. v. Hazelett*, 105 Ind. 212, 55 Am. Rep. 192, and authorities there cited.

Reversed, with instructions to the trial court to sustain appellant's demurrer to the sixth paragraph of reply, and for proceedings not inconsistent with this opinion.

Wiley, J., took no part.

INSURANCE—CONDITION AGAINST USE OF LIQUOR.—Conditions in a policy of life insurance that the policy shall be void if the insured shall use alcoholic drinks so as to injure his health, and that the insurer may cancel the policy when it comes to his knowledge that the insured has made false statements in this respect, or does use alcoholic liquor, are waived, where the insurer's agent makes out the policy, well knowing the insured to be an habitual drunkard, and receives the premiums: *Newman v. Covenant Mutual Ins. Assn.*, 76 Iowa, 56, 14 Am. St. Rep. 196. See, further, the note to *Union etc. Ins. Co. v. Relf*, 38 Am. Rep. 617.

INSURANCE—NOTICE TO AGENT.—Where an insurance company transacts business through an agent having authority to solicit insurance, make out and forward applications, deliver over policies when returned, and collect premiums, notice given to such agent while procuring an application is notice to the company: *Miller v. Mutual Benefit etc. Ins. Co.*, 81 Iowa, 216, 7 Am. Rep. 122. See, too, *Horton v. Home Ins. Co.*, 122 N. C. 498, 65 Am. St. Rep. 717, and note.

INSURANCE—FORFEITURE.—ACCEPTING A PREMIUM, knowingly, for a policy of insurance under conditions which render it invalid is a waiver of the right to insist upon a forfeiture: Note to *Phenix Ins. Co. v. Tomlinson*, 21 Am. St. Rep. 211.

WESTERN ASSURANCE COMPANY v. McALPIN.

[23 Indiana Appeals, 220.]

INSURANCE—FOUNDATION OF ACTION.—In an action against an insurance company for loss by fire, upon an oral agreement to insure, the policy agreed to be issued is not the foundation of the action in the sense that it must be filed with the complaint.

INSURANCE.—A CONTRACT OF INSURANCE MAY REST IN PAROL if all the elements essential to a valid contract are agreed upon. Hence a contract of insurance is established where an agent, with authority to receive applications for insurance and accept risks, agrees to insure certain property, and the time when the risk should begin, the amount of the risk, its duration, the premium, and the kind of policy to be issued were all fixed, and nothing remained to be determined afterward, though the premium was not paid, the agent being indebted to the insured and having on previous occasions issued policies to the insured crediting the premium on account.

INSURANCE—ORAL CONTRACT.—A COURT OF EQUITY will enforce an oral contract for a policy of insurance, and, having jurisdiction for specific enforcement, adjudge the damages just as if the policy had been issued and suit brought thereon.

INSURANCE — BINDING CONTRACT — PAYMENT OF PREMIUM.—Where an insurance agent enters into a contract to insure property, crediting the premium on an account which the agent owed the insured, the contract is binding on the company.

INSURANCE.—A CONTRACT of insurance, or to insure, may exist without either the payment of the premium or the delivery of the policy.

WITNESSES.—THE TESTIMONY OF A DECEASED witness may be repeated at a subsequent trial.

INSURANCE—EVIDENCE—PRIOR POLICY.—In an action upon an oral contract to insure certain property for the same amount and on the same terms as stated in a former policy issued upon the same property, the former policy is admissible in evidence.

INSURANCE—PROOFS OF LOSS—WAIVER.—Where an insurance company denies its liability for loss by fire, proofs of loss are not required as a condition precedent to bringing suit.

APPEAL—HARMLESS ERROR.—Although it is error to permit a witness to state who is the owner of certain personal property, such answer being a conclusion, the error is harmless where there is other undisputed evidence of ownership.

EVIDENCE—PREVIOUS DEALINGS.—Where parties contract with reference to the provisions of previous dealings, the terms of such dealings may be shown in evidence in order to arrive at the intention of the parties; hence where a credit was given for premiums in previous insurance dealings, such dealings may be looked to in determining whether a cash payment or a credit was intended.

APPEAL—EVIDENCE—SUFFICIENCY OF OBJECTION.—An objection to the introduction of evidence that it is irrelevant and immaterial is insufficient to raise any question as to its competency or admissibility.

S. N. Chambers, S. O. Pickens, and C. W. Moores, for the appellant.

W. N. Harding, A. R. Hovey, and E. A. McAlpin, for the appellee.

223 ROBINSON, J. Appellee sues upon an oral contract to insure. The first paragraph of complaint, after showing location of property, ownership by insured at the time of the contract, and of the loss, the period and the amount of insurance and premium paid, avers that, on a date named, appellant agreed, through its agent, to deliver appellee's decedent within a reasonable time its policy of insurance upon the property, in a named amount, against loss and damage by fire; that while the agreement was in force the property burned; that immediately after the fire the agent was notified of the loss, and demand made on him for the execution and delivery of the policy, which demand and payment of the loss was refused. The second paragraph contains additional averments to the effect that at the time of the agreement to issue the policy the agent had policies of a certain form signed by appellant's president and secretary, and issued and delivered by appellant to the agent to be by him countersigned and delivered to persons insured; that by the terms of the policies issued by appellant in the usual form appellant promised to pay the loss sixty days after notice and proof of loss.

The complaint shows the parties to the contract, its subject matter, an insurable interest, the duration of the risk, the amount insured, and premium paid. And it is averred that the company, through its agent, agreed to make and deliver to appellee's decedent, within a reasonable time, its policy of insurance. Nothing as to the terms and conditions of the contract were left open. They were all agreed upon. The policy agreed to be issued is not the foundation of the action, in the sense that it must be filed with the complaint. Thus in *New England etc. Ins. Co. v. Robinson*, 25 Ind. 536, it **223** is said: "The policy of insurance, which the company agreed to issue, was not the foundation of the action, and a copy thereof was not, under the code, required to be filed with the complaint. The company having refused to issue the policy, it was not necessary that the complaint should be special, and show the conditions complied with: *Taylor v. Merchants' etc. Ins. Co.*, 9 How. 390. The conditions precedent were waived

by the refusal of the company to issue the policy: *Post v. Aetna Ins. Co.*, 43 Barb. 351." See *Gold v. Sun Ins. Co.*, 73 Cal. 216; *Baile v. St. Joseph Ins. Co.*, 73 Mo. 371.

The facts found show that November 22, 1892, appellant issued its policy to George and Orme, partners, for one year for ten dollars and thirteen cents premium; that afterward, and during the life of the policy, Orme sold her interest in the property, a stock of furniture, to George, who was thereafter and at the time of the fire the sole owner; that one Crawford, from prior to November 22, 1892, continuously until after the second day of May, 1894, was appellant's agent, and was also agent of other fire insurance companies, and as such agent had intrusted to him by appellant blank policies of insurance signed by the company's officers, and as such agent was authorized to receive applications for insurance, and to accept risks, to write and countersign such policies, deliver them to the insured and collect the premiums; that on the eighteenth day of January, 1894, Crawford called at George's place of business, where the property burned was located, for business other than insuring his property, to talk about trading property, and while there George informed the agent that the insurance on his property had expired, and that he desired to have it renewed for the same amount and upon the same terms as in the former policy; that the agent, in response to this request, then promised George that he would attend to the matter of renewing the insurance immediately; that the agent knew the property belonged at that time to George; that George informed the agent that his insurance had expired in substantially ²²⁴ the following language: "My insurance is out. It is out now. I looked at the policy this morning"; that the agent then remarked, "Well, George, we don't want to burn out without any insurance; that must be attended to"; that George thereupon asked the agent which was the best company in his agency, and, being told by the agent that the Western Assurance Company was the best he had, George thereupon substantially said that that was the company he wanted; that the agent looked around at the stock of goods and asked George, substantially, how much insurance he wanted, and George thereupon told the agent that he wanted the same amount as had been carried in the old policy, just wanted the policy carried out, renewed; and thereupon the agent told George, in substance, that he would be out of town for a day or two, and that they would further talk of trading property

when he returned; that when the request was made for insurance nothing was said as to the payment of the premium, but the agent had previous to that time issued to George two policies, crediting at least one premium on account, not collecting the premium at the time of making the contract or at the time of issuing the policies, and the agent made no request that George should pay the premium for the policy he had requested, and a credit for the premium was contemplated by both parties, the agent being indebted to George for furniture; that the policy was not issued; that on the twenty-eighth day of January, 1894, the property was wholly destroyed by fire, of which the agent was verbally notified on the same day; that on February 3, 1894, George demanded of the agent the policy, which demand was not complied with; that on May 2, 1894, George tendered to the agent ten dollars and thirteen cents in payment of the premium and demanded the policy, which tender was refused, as was also the policy; that on April 30, 1894, George served upon appellant a verified proof of loss, stating therein that the property destroyed was covered by renewed insurance in appellant company on renewal of the former policy; that ²²⁵ during the pendency of the action George died, and appellee was appointed executor; that the loss has never been paid.

As conclusions of law, the court stated that there was a contract of insurance between appellant and George, entered into January 18, 1894, which was in force at the time of the fire; that appellee is entitled to receive of appellant eight hundred and sixty-eight dollars less ten dollars and thirteen cents, which appellant should have on account of premium.

It is no doubt true that where there is simply an offer to insure, without acceptance, or where anything is left open for future adjustment as to amount or duration of risk, or as to premiums, no contract to insure exists. It must clearly appear that all the elements essential to a valid contract are agreed upon. There must be an offer and acceptance of a complete contract to insure: *Haskin v. Agricultural Ins. Co.*, 78 Va. 700; *McCann v. Aetna Ins. Co.*, 3 Neb. 198.

The question presented is whether a contract to insure was consummated between appellant, through its agent, and appellee's decedent on January 18, 1894. A contract of insurance may rest in parol. In *Fames v. Home Ins. Co.*, 94 U. S. 621, it is said: "It is sufficient if one party proposes to be insured, and the other party agrees to insure, and the subject,

the period, the amount, and the rate of insurance is ascertained or understood, and the premium paid, if demanded. It will be presumed that they contemplate such form of policy, containing such conditions and limitations as are usual in such cases, or have been used before between the parties": *Hartford etc. Ins. Co. v. King*, 106 Ala. 519.

The findings, aside from the recitals of any mere evidence they may contain, show a contract to insure between appellant company's agent and appellee's decedent, and not simply a contract to issue a policy of insurance. The agent had authority to receive applications for insurance and accept risks. The findings show the parties making the contract and its subject matter. The time when the risk should begin was fixed by the agent agreeing to attend to the matter ²²⁶ of insurance immediately. The amount of the risk, its duration, and the premium, were fixed by the old policy which was issued by appellant and to which the attention of the agent was at the time expressly directed for information: *Home Ins. Co. v. Adler*, 71 Ala. 516. Both parties understood the kind of policy that was to be issued. Nothing remained to be determined afterward. Had the agent written a policy, which he could have done on the information he had, and upon tendering it to the insured the payment of the premium had been refused, he could have collected it by suit.

It has been held that a court of equity will enforce an oral contract for a policy, and, having jurisdiction for specific enforcement, adjudge the damages just as if the policy had been issued and suit brought on it for the loss of the thing insured. And the effect is the same whether the suit is on the contract for the loss under the risk or for breach of the contract for not insuring, because the loss is the measure of damages: *Tayloe v. Merchants' Ins. Co.*, 9 How. 390; *Commercial etc. Ins. Co. v. Union etc. Ins. Co.*, 19 How. 318; *Baile v. St. Joseph Ins. Co.*, 73 Mo. 371; *Wood on Fire Insurance*, sec. 11.

It is further argued that the complaint avers that the premium was paid; that the findings show that the premium was not paid. The findings show that nothing was said as to the payment of the premium, that the agent did not demand it, that in previous dealings between the parties one premium had been credited on account, and that the parties contemplated a credit, the agent being indebted to the insured. As between the agent and the insured the finding shows the premium was in effect paid. Whether there was a payment to

Ins. Co., 114 N. Y. 415, 11 Am. St. Rep. 674; Audubon v. Excelsior Ins. Co., 27 N. Y. 216; Hartford Ins. Co. v. King, 106 Ala. 519.

Upon some material questions the evidence is conflicting but upon each there is some evidence, and the preponderance is a question for the trial court.

One of the grounds for a new trial was permitting appellee to read in evidence the longhand manuscript of the testimony of the original plaintiff, George, at a former trial of the case. The witness' death after the former, and before the present, trial was shown. The issues on the former trial, as shown by the pleadings introduced in evidence, were essentially the same as these at the present trial. In the two trials it was sought to recover on an oral contract to insure the same property in the same amount at the same rate, the only difference being that in the former complaint the date of the contract was fixed at on or about November, 1893, and in the present case the date is fixed in January, 1894. It is clear the witness testified then as to the same subject matter in controversy now, and that the issue then tried was such as to challenge a full cross-examination respecting the right asserted now. It is well settled that the testimony of a deceased witness may be repeated at a subsequent trial: *Rooker v. Parsley*, 72 Ind. 497; *Indianapolis etc. Ry. Co. v. Stout*, 53 Ind. 143; *Horne v. Williams*, 23 Ind. 37; 1 *Greenleaf on Evidence*, sec. 164; *Gillette on Independent and Collateral Evidence*, sec. 188.

The admission of the old policy in evidence was not error. It is true that policy was issued to a firm, since dissolved, but appellee's decedent was a member of the firm. As the ²³⁰ old policy was issued by appellant, was on the same property, and was referred to in the negotiations between the parties, it was admissible in evidence in aid of the agreement: *Home Ins. Co. v. Adler*, 71 Ala. 516.

Certain alleged proofs of loss were introduced in evidence, and the findings show that proofs of loss were made. Soon after the fire the company denied that any contract of insurance existed by refusing to issue a policy. When the company refused, upon request, after the loss, to issue a policy based upon the oral agreement, it in effect denied any liability, and proofs of loss were not required as conditions precedent to bringing suit. The fire occurred January 28th, and on February 3d following a demand was made for the policy,

which was refused. This amounted to a denial of liability. This action of the company went to the foundation of the claim, and amounted to a denial of liability: *Audubon v. Excelsior Ins. Co.*, 27 N. Y. 217; *Tayloe v. Merchants' etc. Ins. Co.*, 9 How. 390.

Where there is other undisputed evidence that a certain person was the owner of certain personal property on a date named, it is harmless error to permit a witness to state who the owner was in answer to a direct question to that end. Admitting the answer to be a conclusion, the error is not reversible error under such circumstances.

An agent authorized to accept risks and collect premiums, having the power to make a valid parol contract to insure, may waive the payment of the premium in cash. And where the parties contract with reference to provisions of previous dealings, the terms of such dealings may be shown in order to arrive at the intention of the parties. And where in previous dealings a credit was given for premiums, such dealings could be looked to in determining whether a cash payment or a credit was intended: *Commercial etc. Ins. Co. v. Morris*, 105 Ala. 498; *Wood on Fire Insurance*, sec. 28. But, as before said, the payment of the premium is not a precedent condition to a valid oral contract to insure.

231 A witness called had formerly been a partner of appellee's decedent, and a line of goods like those in controversy were owned by the firm. The firm had dissolved, and decedent had purchased witness' interest. An answer by the witness that she had no interest in the goods when burned would not tend to prove title in decedent. But as there was evidence showing that the decedent was the owner when the goods were burned, a negative answer by the witness that she had no interest in them at that time could work no harm to appellant.

A witness, the company's adjuster, testified, over objection, that the old policy issued to the firm, and which was shown the witness, was the form of policy the company issued to its agents so far as the printed matter and signatures of the officers were concerned. Practically the same question was asked the agent with whom the negotiations to insure were had. Objection was made to this evidence as "immaterial" and as "irrelevant and immaterial." It has often been held that such objections are not sufficient to raise any question as to the competency or admissibility of evidence: *State v. Hughes*, 19

Ind. App. 266; *Miller v. Dill*, 149 Ind. 326. Judgment affirmed.

Henley, J., dissents.

INSURANCE—ORAL CONTRACT.—A contract of insurance is not within the statute of frauds: *Sanford v. Orient Ins. Co.*, 174 Mass. 416, 75 Am. St. Rep. 358. When a contract has been made but no policy has been issued, the remedy of the insured, after a loss, may be by bill in equity; and the court may at once decree the payment of the amount recoverable under the policy had it been issued. However, to sustain an action on such a contract, the elements thereof must have been agreed upon, and nothing left open and undetermined, and all conditions precedent complied with: *Croft v. Hanover Fire Ins. Co.*, 40 W. Va. 508, 52 Am. St. Rep. 902.

INSURANCE—WHEN CONTRACT COMPLETE.—Neither the payment of the premium nor the reception of the policy by the insured is a prerequisite to the consummation of a contract of insurance; it is complete when there is assent to its terms by the parties, upon a valuable consideration: *Blanchard v. Waite*, 23 Me. 51, 43 Am. Dec. 474; note to *Long v. North British etc. Ins. Co.*, 21 Am. St. Rep. 883. Payment of the premium is not necessary to an oral contract of insurance if credit is given to the insured: *Croft v. Hanover Fire Ins. Co.*, 40 W. Va. 508, 52 Am. St. Rep. 902.

INSURANCE—WAIVING PROOF OF LOSS.—Any disavowal by an insurance company of its liability to the insured avoids the necessity of furnishing proofs of loss as required by the policy: *Wilson v. Commercial etc. Assur. Co.*, 51 S. C. 540, 64 Am. St. Rep. 700; *Angier v. Western Assur. Co.*, 10 S. Dak. 82, 66 Am. St. Rep. 686.

STATE v. ROSENBAUM.

[23 Indiana Appeals, 236.]

CRIMINAL LAW—INTOXICATING LIQUORS—FORMER ACQUITTAL.—The proprietor of a saloon who permits two or more persons at the same time to be in his saloon during prohibited hours cannot be prosecuted for a separate offense as to each of such persons, under a statute making it a crime for the proprietor to permit "any person or persons other than himself and family" to go in to such saloon during prohibited hours.

CRIMINAL LAW—FORMER ACQUITTAL.—A prosecution for any part of a single crime bars any further prosecution based upon the whole or a part of the same crime.

W. L. Taylor, attorney general, Merrill Moores, C. C. Hadley, and A. E. Chizum, for the state.

F. Foltz, C. G. Spitler, and H. R. Kurrie, for the appellee.

²³⁶ **ROBINSON, J.** Appellee was indicted for permitting a person named to be and remain in his place of business dur-

ing prohibited hours, contrary to the provisions of section 3 of the act of March 11, 1895: Acts 1895, p. 248.

Appellee pleaded in abatement, setting up a former indictment and acquittal, that the person named in the present indictment as having been in the saloon was in company with the person named in the former indictment, and that the acts complained of in the present indictment are identical with those complained of in the former indictment of which he had been acquitted. A demurrer to this plea was overruled, and upon this ruling the appeal is based.

The question presented is, Can the proprietor of a place where liquors are sold, who permits two or more persons at the same time to be in the room during prohibited hours, be prosecuted for a separate offense as to each of such persons? The attorney general, in his brief, states that he is of the opinion that the question must be answered in the negative.

In *Smith v. State*, 85 Ind. 553, the court said: "The true test to determine the sufficiency or insufficiency of a plea ²³⁷ of former acquittal as a bar to the pending prosecution is this: Would the same evidence be necessary to secure a conviction in the pending, as in the former, prosecution? If it would be, then the plea of former acquittal would be a complete bar to the pending prosecution; otherwise, the plea would not be sufficient."

The case of *State v. Elder*, 65 Ind. 282, 32 Am. Rep. 69, states the following rule: "When the facts constitute but one offense, though it may be susceptible of division into parts, as in larceny for stealing several articles of property at the same time belonging to the same person, a prosecution to final judgment for stealing a part of the articles will be a bar to a subsequent prosecution for stealing any other part of the articles, stolen by the same act": See, also, *State v. Gapen*, 17 Ind. App. 524; *Davidson v. State*, 99 Ind. 366; *Fritz v. State*, 40 Ind. 18; *Wininger v. State*, 13 Ind. 540; *Brinkman v. State*, 57 Ind. 76.

The statute makes it unlawful for the proprietor to permit "any person or persons other than himself and family" to go into the room at prohibited times. In the case at bar, the crime committed was permitting "persons other than himself to go into such room" during prohibited hours. It was a single offense which cannot be split up and prosecuted in parts. "A prosecution for any part of a single crime bars any further prosecution based upon the whole or a part of the same crime": *Laupher v. State*, 14 Ind. 327. The appeal is not sustained.

FORMER CONVICTION OR ACQUITTAL—A prosecution and conviction for any part of a single crime bars any further prosecution based upon the whole or any part of the same crime: *State v. Emery*, 68 Vt. 100, 54 Am. St. Rep. 878. A conviction or acquittal of one offense is a bar to a prosecution of another where the offense on trial is a necessary element in, and constitutes an essential part of, the other: *Note to People v. Bentley*, 11 Am. St. Rep. 229.

MOORE v. HINSHAW.

[23 Indiana Appeals, 267.]

ALTERATION OF INSTRUMENTS—INTEREST CLAUSE IN NOTE—RELEASE OF SURETY.—Where an agreement is made that notes shall be executed bearing eight per cent interest, and the principal and surety sign them in blank as to the rate of interest, a subsequent insertion of the agreed rate by the principal and payee, without the knowledge and consent of the surety, is a material alteration of the instrument which will release the surety.

S. D. Stuart and C. G. Reagan, for the appellant.

I. W. Christian, W. S. Christian, and J. E. Hodgin, for the appellee.

²⁶⁸ **WILEY, J.** Appellee sued appellant and one Elwood Moore upon three promissory notes. A joint answer in two paragraphs was filed. The first was a general denial, and the second a plea of non est factum. A trial by jury resulted in a general verdict against both of the defendants below. The jury also answered interrogatories submitted to them upon special questions of fact. Appellant alone moved for a new trial, which was overruled, and judgment was rendered on the verdict. The overruling of the motion for a new trial is the only error assigned. The facts upon which the decision of the case must rest are fairly stated by the jury in their answers to interrogatories, and are as follows: That prior to the execution of the notes sued on, appellant and Elwood Moore had executed and delivered to appellee a certain note; that after its maturity, suit was brought upon it; that there was then due thereon one hundred and fifty-nine dollars and thirty-five cents; that pending said action, the same was compromised on the terms that appellant and Elwood Moore should execute the three notes in suit, aggregating the amount due on the original note, the latter notes to bear eight per cent interest and to become due in one, two, and three years

from date; that the notes sued on were executed in pursuance to that agreement; that appellant and Elwood Moore each signed the notes in suit; that when they signed them the rate of interest was not specified; that the figure "8" was written in the notes at the request of the appellee after they were signed; that the alteration by inserting the figure "8" was made without the knowledge of appellant, and that such alteration was made in accordance with an agreement made prior thereto between appellant and appellee. While these are the facts specially found, there are other material facts which appear from the evidence that ²⁰⁰ are of sufficient importance to merit mention. Appellant and Elwood Moore were brothers, and appellant was surety for Elwood. The note in settlement of which the notes in suit were given was executed several years prior to the commencement of suit upon it. The notes in suit were written or filled out by a brother of appellant at the house of Elwood Moore, where they were signed. After they were thus signed, Elwood took them to the home of appellee, showed them to him, and he then agreed to accept them in settlement of the then pending litigation, if his attorney said they were "all right." Elwood and appellee then went to the office of appellee's attorney; the notes were shown to him, and he declared they were "all right" except the rate of interest was left blank. After some conversation between them, it was agreed, and so stated, that the rate of interest was overlooked, and it was then and there agreed between appellee and Elwood that the figure "8" should be inserted in compliance with the agreement. This was done by the attorney in the presence of Elwood and appellee. The evidence is conflicting as to whether appellee accepted the notes when they were first shown to him at his house, or after the conference at the office of the attorney, and after the figure "8" was inserted therein.

The question presented for decision, therefore, is simply this: Where an agreement is made that notes shall be executed bearing eight per cent interest, and the principal and surety sign them in blank as to the rate of interest, can the rate of interest be inserted in the notes in conformity with the agreement between the parties, in the presence and with the consent of the principal and payee, and without the knowledge and consent of the surety, and the latter be bound?

If the insertion of the rate of interest is a material alteration of the instrument, within the meaning of the law, then

the surety is released, unless the agreement that the notes should bear the rate of interest inserted changes the rule. ²⁷⁰ The rule that governs here differs from that which holds an indorser of a note liable, where he signs or indorses it in blank as to date, amount, payee, and where payable, and delivers it to the maker, and the latter fills the blanks. In such case it is held that the indorser gives to the maker implied authority to fill such blanks so as to give the instrument force and effect and to make it a perfect instrument: See Spitzer v. James, 32 Ind. 202, 2 Am. Rep. 334; Wilson v. Kinsey, 49 Ind. 35; Rich v. Starbuck, 51 Ind. 87; Emmons v. Meeker, 55 Ind. 321; Armstrong v. Harshman, 61 Ind. 52, 28 Am. Rep. 665; Gothrapt v. Williamson, 61 Ind. 599; Brown v. First Nat. Bank, 115 Ind. 572; Marshall v. Drescher, 68 Ind. 359; De Pauw v. Bank of Salem, 126 Ind. 553.

In the case before us, however, the notes in question were perfect instruments when signed by appellant. He knew, as is shown by the evidence, which is uncontradicted on this point, that no rate of interest was specified when he signed the note. This, however, would not in any sense affect their validity, for under the statute any promise in writing to pay money, where no rate of interest is fixed by the writing itself, such promise shall bear six per cent interest: Burns' Rev. Stats. 1894, sec. 7043.

In Palmer v. Poor, 121 Ind. 135, it was held that where a note had been altered after it had been signed, by inserting the figure "8" before the words "per cent interest," without the knowledge or consent of the maker, was such a material alteration that a recovery could not be had. Elliott, C. J., in rendering the opinion of the court, said: "The alteration in the note was a material one. . . . 'It is a material alteration,' says Mr. Randolph, 'to add an interest clause, even without any fraud on the holder's part': 3 Randolph on Commercial Paper, sec. 1756." Continuing the learned judge said: "This conclusion is fully sustained by the decided cases": Citing Hert v. Oehler, 80 Ind. 83; Bowman v. Mitchell, 79 Ind. 84, and cases cited; Schnewind v. ²⁷¹ Hackett, 54 Ind. 248; Shanks v. Albert, 47 Ind. 461; Boustead v. Cuyler, 116 Pa. St. 551; 1 Am. & Eng. Ency. of Law, 510. See, also, Hart v. Clouser, 30 Ind. 210; McCoy v. Lockwood, 71 Ind. 319.

When the notes in suit were signed by appellant and came to the possession and knowledge of appellee, they were com-

plete and perfect instruments in all respects. If appellee desired to change the contract as expressed by the notes, it was his duty to treat with appellant as one of the parties to the contract, and secure his assent thereto: *De Pauw v. Bank of Salem*, 126 Ind. 553.

Mr. Daniel on Negotiable Instruments, section 1385, says: "In the fifth place, as to interest, any addition of words making the bill or note bear interest when it originally did not, or changing the time when interest should run, or varying the percentage of interest, is of the same character as if it changed the principal." The author cites many authorities in support of the rule. From the authorities, we are led to the conclusion that the verdict was not sustained by sufficient evidence, and was contrary to law, and hence will not support a judgment against appellant. This conclusion makes it unnecessary to decide other questions discussed.

The judgment is reversed, and the court below is directed to sustain appellant's motion for a new trial.

NEGOTIABLE INSTRUMENTS—ALTERATION OF.—Where, after the indorsement of a note in which the time and place of payment are left blank, the maker, before delivery thereof, fills the blanks and adds "with interest," the addition of the words "with interest" is an unauthorized alteration of the instrument, which discharges the indorser: *McGrath v. Clark*, 56 N. Y. 34, 15 Am. R. p. 372. However, if the maker of a note fills in all the blanks upon a printed form except the one intended for the rate of interest, and that is thereafter filled by his transferee without his knowledge, he is liable to a bona fide holder: *Weidman v. Symes*, 120 Mich. 657, post, p. 603.

SCHERER v. SCHERER.

[23 Indiana Appeals, 384.]

HUSBAND AND WIFE—AGREEMENT FOR SEPARATION.—A contract entered into between husband and wife, who are living apart by mutual consent, whereby the husband agrees to pay to his wife a certain sum each month for her support, is without consideration and cannot be enforced.

J. B. Coles, for the appellant.

O. F. Roberts and S. H. Stewart, for the appellee.

³⁸⁵ **COMSTOCK, J.** The complaint avers in substance that appellant and appellee were married in April, 1896, and con-

tinued to live together as husband and wife until the 30th of July of that year, at which date they separated. On the 1st of September, 1896, they entered into a written contract, made a part of the complaint, in which, among other things, it was stipulated "that for the purpose of providing a support for appellee appellant agreed to pay her for her maintenance ten dollars per month on the first day of each month, commencing on said first day of September." Pursuant to this agreement, appellant paid her three monthly installments, amounting to thirty dollars and no more. At the commencement of this suit there was due appellee fourteen monthly installments amounting to one hundred and forty dollars. A demurrer to the complaint for want of facts was overruled. Appellant answered in two paragraphs; the first set up affirmative matter; the second was a general denial. A demurrer was sustained to the first paragraph upon the ground that it did not contain facts sufficient to constitute a defense to the plaintiff's cause of action. The trial resulted in a judgment in favor of appellee for one hundred and forty dollars. Upon this appeal, appellant assigns as error the action of the court: 1. In overruling the demurrer to the complaint; 2. In sustaining the demurrer to the first paragraph of answer. Believing the complaint insufficient, we do not pass upon the sufficiency of the answer.

The contract in question is in the following language: "This agreement made this 1st day of September, 1896, by and between John L. Scherer of Ohio county, in the state of Indiana, and Anna Scherer of Dearborn county, in the state of Indiana, witnesseth: That whereas said John L. Scherer and Anna Scherer are husband and wife, but have lived apart since the 30th day of July, 1896, by reason of the abandonment one of the other; and whereas said Anna Scherer is about to commence an action for support against said John L. Scherer, therefore, for the purpose of providing a support for said Anna Scherer to an extent by compromise ³⁹⁶ agreed on, and for the further purpose of determining the compensation to be paid said Anna Scherer by way of alimony in the event of divorce proceedings, one against the other, it is agreed: (1) That said John L. Scherer shall pay to said Anna Scherer, for her maintenance and support, \$10 per month, commencing this day, and payable at the office of Downey & Shutts, in Aurora, Indiana. (2) That if, after the expiration of two

years from said 30th day of July, 1896, either party shall prosecute to final judgment an action for divorce against the other, the amount of alimony to be adjudged in favor of said Anna Scherer shall be \$400, on which shall be credited the aggregate amount theretofore paid in such monthly installments. (3) That if said John L. Scherer, after the expiration of said two years, shall successfully prosecute his action for divorce against said Anna Scherer, he shall be further entitled to credit on said judgment for alimony, in a sum equal to the necessary costs of said action, not exceeding \$15, and not including his attorney's fees."

It is not shown by the complaint nor the contract that this separation was occasioned by any reason justified by the law. It is not necessary to cite authorities to the effect that the law favors marriage, and does not sanction contracts intended to effect its dissolution. It appears that the parties were living apart. It appears also that divorce proceedings were in contemplation. The amount of alimony which the wife was willing to accept was agreed upon, from which was to be deducted the amount theretofore paid in monthly installments, under the agreement, together with the costs of the suit to a stated amount, in the event of a successful prosecution of a suit for divorce. Beach on Modern Law of Contracts, at section 1256, says: "If a wife is living apart from her husband, with his consent, or for a justifiable cause, he is liable for necessities furnished her, whether by an individual on her application or by a city or town under the laws for the relief of paupers. In an action against a husband for necessities ³⁹⁷ furnished his wife while she was living apart from him, the burden is on the plaintiff to show that her absence was such as to give her a right to use her husband's credit": Mayhew v. Thayer, 8 Gray, 172; Sturbridge v. Franklin, 160 Mass. 149; New Bedford v. Chace, 5 Gray, 28; Monson v. Williams, 6 Gray, 416; Brookfield v. Allen, 6 Allen, 585.

The contract recites that the parties were living apart "by reason of the abandonment one of the other." If this language is construed to mean that the parties had separated by mutual consent, and certainly it will bear no construction more favorable to appellee than that she voluntarily separated from her husband, it fails to show that the wife left her husband for reasons justified by law. In the absence of such showing, she would have no claim against him for support, and any con-

tract to furnish such support would be without consideration. Having separated from him, she can have no claim upon his support unless that separation was justified by some reason recognized by our law. No such reason appears. The dissolution of the marriage contract is not to be left to the caprice of the parties. Our statute provides causes for absolute divorce. It makes no provision for separation a mensa et thoro. Had appellee a cause for divorce, she was entitled to a judicial determination of her rights and to alimony. It is the policy of the law that those sustaining to one another the relation of husband and wife should live together. Contracts for separation and separate maintenance are approved by English decisions, which have been followed by a number of American cases, but in them provision is made through trustees. We are not advised of any cases in our country where an executory contract entered into by husband and wife without the intervention of a trustee has been enforced by the courts. That many contracts of this character have been carried out is well known, but they "are not favorites of the law," is well known: *Kedey v. Petty*, 153 Ind. 179.

³⁸⁸ *Reed v. Beazley*, 1 Blackf. 96, is strongly relied upon by appellee. In that case the suit was upon a note executed to a trustee, the consideration of which was shown by certain articles of agreement executed by Reed of the first part, his wife of the second part, and Beazley, trustee, of the third part, providing for the support of his wife. The husband covenanted for his own security and provided that in case he should be compelled to pay any of the debts of his wife he should retain the amount thereof out of the money he had covenanted to pay. The cause of the separation does not appear from the opinion, but we quote from it the following: "A disposition to separate man and wife or to facilitate a separation is nowhere manifested by the law or countenanced in the British books. But when unhappy differences arise and a separation is unavoidable, the law interposes to enable the parties to ameliorate the effects of the separation"—from which we may infer that the cause of the separation was one at that time a ground for divorce. No other case in our reports has gone so far; it has not been cited in any of our decisions, but even in that case provision was made through a trustee.

The judgment is reversed, with instruction to the trial court to sustain the demurrer to the complaint.

HUSBAND AND WIFE—CONTRACT TO SUPPORT WIFE.—A contract between husband and wife after their separation, through the intervention of a trustee, is effective to bind the husband to contribute the sum therein provided for her support, and it is also binding on the wife and trustee that she will accept the payment therein designated in full satisfaction of her maintenance and support: *Galusha v. Galusha*, 116 N. Y. 636, 15 Am. St. Rep. 453. But see *Miller v. Miller*, 78 Iowa, 177, 16 Am. St. Rep. 431, and note.

PEIRCE v. CHISM.

[23 Indiana Appeals, 505.]

RECEIVERS—SUITS AGAINST—COMPLAINT.—A receiver can neither sue nor be sued without leave of the court by which he was appointed; hence in an action against a receiver it is essential to aver in the complaint that leave to bring the action has been obtained.

C. G. Guenther and A. B. Clark, for the appellant.

J. C. Blacklidge, C. C. Shirley and C. Wolf, for the appellee.

⁵⁰⁵ **HENLEY, J.** This was an action brought by the appellee against the appellant to recover damages arising from the alleged negligent killing of appellee's horses. It appears from the complaint that at the time of the commencement of the action the property of the corporation was in the hands of a duly appointed and qualified receiver. The only error assigned is the overruling of the demurrer to the first and second paragraphs of the amended complaint. The only objection pointed out by counsel for appellant is that neither paragraph of complaint avers that leave of court had been obtained to bring the action against the receiver. It seems to us that this objection to the complaint is well taken. Numerous and late decisions of both courts of appeal in this state have held that a receiver can neither sue nor be sued, without leave of the court is first obtained.

In the case of *Keen v. Breckenridge*, 96 Ind. 69, the court said: "As a receiver, in the absence of statutory authority, can neither sue nor be sued without leave of the court by which he was appointed, we think it is essential to aver in the complaint that leave to bring the action had been ⁵⁰⁶ granted by the proper court." The exact question was also passed upon

by the supreme court in the case of *Wayne Pike Co. v. State*, 134 Ind. 672, where the court say: "It seems to be settled that a receiver, as a general rule, can neither sue nor be sued, without leave of the court making the appointment is first obtained." This court in the case of *Vigo Real Estate Co. v. Reese*, 21 Ind. App. 20, say: "It is the law that a receiver cannot sue or be sued without leave of the court making the appointment being first obtained," etc.: See, also, *Hatfield v. Cummings*, 142 Ind. 350; *Gainey v. Gilson*, 149 Ind. 58. The reasons why this rule obtains are fully set out in the cases above cited, and it is not necessary that we prolong this opinion by repeating them. Nor is it necessary that we construe the case of *Ohio etc. R. Co. v. Nickless*, 71 Ind. 271, as the cases quoted from are later cases, and, if they establish a different doctrine, are controlling. It is provided by Congress "that every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice": 24 U. S. Stats. at Large, sec. 3, p. 554.

We cannot presume that the receiver in this case was appointed by a United States court. An averment that he was so appointed would have been sufficient, and would have avoided the other objection to the complaint that leave to sue had not been first obtained. Under the authorities in this state, we must hold that in the absence of the averment in each paragraph of the complaint that leave to bring the action had been granted by the proper court, both paragraphs of the complaint were insufficient. The judgment is ⁵⁰⁷ therefore reversed, with instructions to the lower court to sustain appellant's demurrer to each paragraph of the amended complaint.

RECEIVERS—LEAVE OF COURT TO SUE.—As to whether or not a receiver may be sued without leave of the court by which he was appointed, see the monographic note to *Malott v. Shimer*, 74 Am. St. Rep. 285-300.

BAKER v. CAUTHORN.

[23 Indiana Appeals, 611.]

EXECUTORS AND ADMINISTRATORS—LIABILITY OF DECEDENT'S ESTATE FOR ATTORNEY'S SERVICES PRIOR TO EXECUTOR'S APPOINTMENT.—An attorney at law who renders services, directly connected with the settlement of a decedent's estate, to an executor named in the will before he actually qualifies as such executor, is entitled to collect his fees for such services in the same manner as other claims against the decedent's estate are collected.

W. A. Cullop and C. B. Kessinger, for the appellant.

H. S. Cauthorn, C. E. Dailey, and H. S. Cauthorn, Jr., for the appellees.

⁶¹¹ HENLEY, J. Appellees are partners practicing law under the firm name and style of Cauthorn, Dailey & Cauthorn. They commenced this action by filing against the estate ⁶¹² of appellant's decedent their certain claim for attorneys' fees rendered said estate. The amount claimed is one hundred dollars, and is charged in the claim to be as a retainer by the executor and for advice in the matter of said trust. The cause went to trial upon the issues tendered by the claim and the statutory answers, and was submitted to the court for trial without the intervention of a jury, which resulted in a finding and judgment in favor of appellees and allowing the full amount of their claim. Appellant introduced no evidence. At the proper time appellant moved for a new trial upon three grounds, that the finding of the court was contrary to law, was contrary to the evidence, and was not sustained by sufficient evidence. The overruling of appellant's motion for a new trial is the only alleged error assigned in this court. It is contended by appellant that the services rendered by appellees were to the said James E. Baker before he actually became the executor of decedent's will, and that said Baker is individually liable for the value of whatever services were so rendered, and not said estate. It is not contended that appellees were not retained, nor that the advice was not given, nor that the services were not of the value of one hundred dollars, but the sole contention seems to be that because the actual work which was done occurred prior to the time appellant in fact qualified as executor, that said Baker was individually liable, and appellees had no claim against the estate which he, Baker, was

representing. The facts, which are wholly uncontradicted, were as follows: Appellant was the husband of one Nancy L. Baker, who died testate, leaving an estate of the value of about twenty thousand dollars. Appellant was named by the testatrix in her will as the executor. He consulted with appellees as to whether or not he could, under the laws of this state, qualify as executor, he having been at the time of his said wife's death a nonresident of the state. He was informed that he could qualify and serve as such executor. He then inquired as to the necessary bond, and was advised that he could give a surety company bond or ⁶¹³ appellees would assist him in giving the bond if desired. Appellant employed appellees to assist him in giving the bond, which was to be in the sum of fifty thousand dollars, and the evidence shows that, in appellant's application to the surety company for bond, appellees were named therein as attorneys for the estate. Appellant also at the time retained the firm of attorneys, of which appellees were the individual members, to assist him in the execution of his trust. It is not shown that appellees were ever discharged as appellant's attorneys, but it is shown by the evidence that nothing further in the way of services was required of appellees by appellant, but that they at all times held themselves ready to perform any services demanded of them, and were in a position which prevented them from accepting any employment adverse to the interests of the trust represented by appellant. The evidence is also to the effect that the services were reasonably worth to the estate the sum of one hundred dollars, and there is also evidence to the effect that one hundred dollars was a reasonable fee as a retainer in this case, so that if appellees are entitled to anything under the evidence, there can be no contention as to the correctness of the amount. We think the evidence sustains the finding and judgment of the lower court; it shows that the services rendered by appellees were connected with the settlement of his decedent's estate. There was no special agreement between James E. Baker and appellees that they were to look to the estate alone for payment, hence they could if they so desired look to said James E. Baker personally for the value of such services: *Long v. Rodman*, 58 Ind. 58. Appellees waived the right to hold said James E. Baker personally and elected to hold the estate for the value of such services. This they had a right to do: *Long v. Rodman*, 58 Ind. 58.

Section 2378 of Burns' Revised Statutes of 1894 provides as follows: "No executor named in the will shall interfere with the estate intrusted to him, further than to preserve the same until the ⁶¹⁴issuing of letters; but for that purpose he may prosecute any suit to prevent the loss of any part thereof." It has been held by the supreme court of this state that, contrary to the doctrine of the common law, the executor derives his power and authority over the property from the laws of the state, and not from the will itself: *Calloway v. Doe*, 1 Blackf. 371; *Lucas v. Tucker*, 17 Ind. 41. After the executor has qualified, his authority over the decedent's property reaches back to the time of the decedent's death and covers all acts done by him in the interest of his trust: *Gilkey v. Hamilton*, 22 Mich. 283.

Under the evidence in this case, we think the executor of the will of Nancy L. Baker could have paid the claim of appellees, and rightfully insisted upon its allowance as a credit in his settlement of the trust; not having done this, the only way open to appellees to secure payment for their services from the trust fund was to file the claim against the estate and proceed as the record shows they have done. We find no error in the record.

Judgment affirmed.

ESTATE OF DECEDENT—LIABILITY FOR ATTORNEYS' FEES.—On the power of an administrator to make the estate of the decedent liable for attorneys' fees, see the monographic notes to *Lucich v. Medin*, 93 Am. Dec. 393-397; *Schlicker v. Hemenway*, 52 Am. St. Rep. 122. An attorney employed by an administrator of an estate has no claim upon it for his services, although they may have inured to the benefit of the estate. He must look for compensation to the administrator: *Pike v. Thomas*, 62 Ark. 223, 54 Am. St. Rep. 292.

A GRANT OF ADMINISTRATION RELATES to the death of the intestate, and legalizes all intermediate acts of the administrator: *Vroom v. Van Horn*, 10 Paige, 549, 42 Am. Dec. 94.

CASES
IN THE
SUPREME COURT OF JUDICATURE
OF
INDIANA.

STEVENS v. LEONARD.

[154 Indiana, 67.]

NEW TRIAL—PROPER DESCRIPTION OF VERDICT—EVIDENCE.—A verdict which is contrary to the evidence is correctly described, in a motion for a new trial, by the language of the statute, as “not sustained by sufficient evidence”; and when so stated, it is not necessary to allege that the verdict is contrary to the evidence.

APPEAL—REVIEWING WEIGHT OF EVIDENCE.—It is not within the province of an appellate court to weigh the evidence, although a preponderance of it against the finding or verdict is apparent and great.

WILLS—TESTAMENTARY CAPACITY—SUFFERING FROM ACUTE PAIN.—The circumstance that a testator, at the time of executing his will, is suffering from acute pain, does not take away his testamentary capacity.

WILLS—UNDUE INFLUENCE—WITHDRAWING QUESTION OF FROM JURY.—On the trial of an action to contest a will on the ground that the testator was of unsound mind, and also for undue influence in the execution of the will, it is not error for the court, by a proper instruction, to withdraw from the jury the question of undue influence where there is no evidence that the will was procured by undue influence.

WILLS—UNDUE INFLUENCE.—THE IGNORING OF NEEDY RELATIVES by a testator is of itself entitled to little weight in determining whether his will was made under undue influence.

WILLS—CONTRADICTION BY SUBSCRIBING WITNESS—PROPER INSTRUCTION.—It is a familiar rule of law that a person who attaches his name as a witness to a testamentary instrument impliedly certifies that the testator is of sound mind and competent to make a will; and while the law will subsequently permit him to testify to the contrary, because the truth, if such it is, should be learned, yet the jury trying the case may consider the fact of such implied contradiction. It is proper, therefore, to so instruct the jury, for such a direction does not usurp their province in determining a question of fact, or in passing upon the credibility of a witness.

WILLS—UNDUE INFLUENCE—EVIDENCE.—Upon the contest of a will, where the plaintiff claims that an unfriendly feeling by the testator for the latter's brother was merely the result of an insane delusion, the actual state of their relations may be shown. Hence, evidence is admissible, on the part of defendants, to prove that the brother had publicly declared to a crowd on one occasion that the testator had, in his lifetime, improved every opportunity to take advantage of his brothers, and had robbed them; and such evidence may be admitted without a preliminary showing that the testator had knowledge of the accusations before his will was made.

WILLS—EXPERT TESTIMONY—SANITY OF TESTATOR—STATEMENT OF FACT—EXPRESSION OF OPINION.—If a physician, shown to possess the necessary qualifications of an expert, is, upon the trial of an action to contest a will on the ground that the testator was of unsound mind, asked the question whether or not from his conversation with and examination of the testator at the time the will was made, such testator "was laboring under an insane delusion or anything of that kind," his answer, "No, he was not," is not objectionable as the statement of a fact, and not the expression of an opinion.

APPEAL—TRIAL OF JUROR'S MISCONDUCT—PRESUMPTION.—After the trial, upon affidavits and counter-affidavits, of an issue as to a juror's misconduct, an appellate court will presume that the decision of the trial court was correct.

N. L. Agnew, D. E. Kelly, E. D. Crumpacker, and J. B. Peterson, for the appellants.

A. C. Harris, A. D. Bartholomew, J. W. Youche, B. K. Elliott, W. F. Elliott, and F. L. Littleton, for the appellees.

⁶⁸ **DOWLING, J.** Joseph Leonard died June 5, 1895, leaving no wife or child. His heirs at law were his three ⁶⁹ brothers, James, Alvah, and John, and the children of a deceased sister, to wit, Lewis W. Stevens, William Stevens, Clara DeMotte, Eva Finney, and Elizabeth Finney. On the tenth day of June, 1895, a paper purporting to be the last will of the said Joseph Leonard, bearing date of December 13, 1888, was presented to, and admitted to probate in, the Porter circuit court, of Porter county, Indiana, which was then in session. Afterward, on the twenty-fifth day of March, 1896, the appellants filed their complaint to contest the said will, alleging unsoundness of the mind of the said Joseph Leonard, and the undue execution of the will. There was a further allegation that a subsequent will had been executed by the said Joseph Leonard revoking the former will, but this ground was abandoned by the contestors and requires no further notice. The statutory requirements as to the verification of the complaint, and the execution of an undertaking for costs were complied with. The appellees appeared and answered. After the commencement

of the action, John Leonard, one of the brothers, died, and John Brodie, as the administrator of his estate, together with the widow and children of the said John Leonard, were by a supplemental complaint made defendants in the place of the said John. On the application of the appellants, the venue of the cause was changed to Lake county, the case was tried by a jury, and a general verdict was returned sustaining the will. A motion for a new trial was overruled, and the court rendered judgment on the verdict. The only error assigned is the overruling of the motion for a new trial.

The first cause for which a new trial was claimed was that the verdict was contrary to the evidence; and the second, that the verdict was not sustained by sufficient evidence. The latter is the proper and statutory cause for which a new trial may be demanded, and, when stated, it is not necessary to allege that the verdict is contrary to the evidence. A verdict which is contrary to the evidence is correctly described ⁷⁰ in the motion for a new trial in the language of the statute, as not sustained by sufficient evidence.

The first proposition in the argument for the appellants is that Joseph Leonard made his will under a delusion concerning the character and conduct of his brother Alvah. The complaint and answer made the question of the soundness or unsoundness of the mind of Joseph Leonard, at the time of the execution of the will, an issue in the cause. Hundreds of pages of evidence in the record exhibit the conflicting facts and opinions of the witnesses called to support and to combat the averment of mental infirmity. The question tried and determined by the jury was not whether Alvah Leonard was a rogue, a hypocrite, and a cheat, nor whether the aversion manifested by Joseph Leonard toward his sister's children was justifiable, or well or ill founded, but whether Joseph was of sound mind when he executed his will. To maintain the issue on the part of appellants, the manifestation of bitter and unnatural sentiments by Joseph Leonard against his brother Alvah was shown, and there was evidence of expressions of unkind feeling toward his sister's children. But this proof was met by testimony that these sentiments and feelings were not the result of insane delusions, but that they had their origin in real grievances and apparent slights. The existence of intense and implacable resentments is not incompatible with entire soundness of understanding; and trivial instances of disrespect may create aversion and dislike in a mind which is either sensitive or exacting

and imperious. All these facts were before the jury, and, after long deliberation, they arrived at the conclusion that Joseph Leonard was not of unsound mind when he made his will. In our opinion, the evidence entirely fails to show that the feelings of Joseph Leonard toward his brother Alvah and the children of his deceased sister were the result of insane delusions or hallucinations. The deceased was evidently a man of coarse but vigorous mind, of strong will, illiterate, and unrefined. His prejudices were ⁷¹ violent, perhaps unjust and excessive, but we find no support in the evidence for the allegation of the complaint that his mind was unsound, and that he was incapable of disposing of his estate by will. It is not within the province of this court to weigh the evidence, and even where the preponderance against the finding or verdict is apparent and great, we cannot, under the oft-repeated rule of decision by which we are governed, disturb the conclusions of the court or jury. The circumstance that the supposed testator was, at the time of the execution of the will, suffering from acute pain, did not take away his testamentary capacity: *Torrey v. Blair*, 75 Me. 548. The evidence, in our opinion, fully sustains the verdict, and the court did not err in refusing to grant a new trial on account of the alleged insufficiency of the proof.

The appellants next complain that the court erred in giving instruction No. 1, which was in these words: "There is no evidence to show that the testamentary instrument in question was not, in the matter of forms gone through with, in all respects duly executed. I do not withdraw from your consideration, if you deem it important, any proof as to the extraneous influences, if any, which operated on the mind of the testator, if they did so operate, but, upon the condition of the evidence in this case, I instruct you that such influences, if any, can only be considered upon the question as to whether the testator was of unsound mind. There is, therefore, but one ultimate question for your consideration under the facts in this case, and that is, Was the testator at the time he signed the testamentary disposition of his property now in contest so far of unsound mind as to invalidate the document which has been probated as his will?"

Counsel say in their brief: "Of course, it is at once to be perceived that this instruction takes out of the record, as it is intended to do, the question of undue influence. This was a question upon which the appellants relied, and now ⁷² insist that the court erred in withdrawing the question from the jury.

The same question is presented in instruction No. 10, asked for by the appellants (page 61 of the record), which is as follows: 'If you believe from the evidence that at the time of making the will in question, and for several years prior thereto, Joseph Leonard was in poor health, and in a condition of nervousness and excitability, and if you further believe that during that time James Leonard, one of the defendants, took advantage of his enfeebled condition, and by words and insinuations poisoned the mind of the said Joseph Leonard against his brother Alvah, to such an extent that said Joseph possessed an intense hatred of his said brother, and was induced by said hatred to give all his property to James and his family by will, said will is invalid and should be set aside.' "

If there was evidence that the execution of the will was procured by the exercise of undue influence, then the instruction given was erroneous, because it withdrew from the consideration of the jury that element of the case. If there was no evidence of undue influence, the direction of the court was right. The burden of proof was upon the appellants, and, if the evidence in the cause entirely failed to sustain any one of the grounds upon which the validity of the will was assailed, the court had the right to withdraw the consideration of such ground, and to instruct the jury to disregard it: *Faris v. Hoberg*, 134 Ind. 269, 39 Am. St. Rep. 261; *Ohio etc. Ry. Co. v. Dunn*, 138 Ind. 18; *Palmer v. Chicago etc. Ry. Co.*, 112 Ind. 250.

It is necessary, therefore, to ascertain what constitutes undue influence within the meaning of the law, and then to determine whether there was any evidence of such undue influence before the court and jury. "Undue influence has been defined as that which compels the testator to do that which is against his will, through fear, or the desire of peace, or some feeling which he is unable to resist, and 'but for which the will would not have been made as it was': *Redfield's 73 Law of Wills*, 4th ed., 530; 27 Am. & Eng. Ency. of Law, 495, and notes. Again, it is said that "the influence must be undue, in order to vitiate the instrument, because influences of one kind or another surround every rational being, and operate necessarily in determining his course of conduct under every relation of life. Within due and reasonable limits such influence affords no ground of legal objection to his acts. Hence mere passion and prejudice, the influence of peculiar religious or secular training, of personal associations, of opinions, right or

wrong, imbibed in the natural course of one's experience and contact with society, cannot be set up as undue to defeat a will, if, indeed, it were possible to gauge the depth of such influences at all. 'It is extremely difficult,' as Lord Cranworth has observed, 'to state in the abstract what acts will constitute undue influence in questions of this nature. It is sufficient to say that, allowing a fair latitude of construction, they must range themselves under one or other of these heads—coercion or fraud.' Not even can the circumstance that the influence gained by one individual over another was very great be treated as undue in our present connection; especially if the person influenced had free opportunity and strength of mind sufficient to select what influences should guide him, and was in the full sense legally and morally a responsible being": Schouler on Wills, sec. 227; *Boyse v. Rossborough*, 6 H. L. Cas. 2; *Wingrove v. Wingrove*, 11 Prob. Div. 81.

The American editor of Jarman on Wills, in an exhaustive note on the subject of undue influence, states the law thus: "The test to be applied is agreed to be this: Was such influence brought to bear as to take away, that is, did it take away, the supposed testator's free agency in this instance? . . . Un-free agency in a case of undue influence is simply this: The apparent testator is but the instrument by which the mastering desire of another is expressed; the supposed will, or the particular part in question, is not the will of the supposed testator except in the sense that he has⁷⁴ consented to put his name to the instrument in the form in which it appears. Of course, yielding to influence is consistent with free agency; agency is free in the eye of the law, however much the agent is influenced by other men until the influence amounts to domination of the will. Thus, persuasion and argument are not improper, so long as they do not overcome free agency": 1 Jarman on Wills, 66, note; Dale's Appeal, 57 Conn. 127.

We have been unable to find in the great mass of testimony in this case any evidence of the existence of undue influence, or its exercise upon the mind or sensibility of the deceased in connection with the disposition of his estate by his will. In the course of his dealings with his brother Alvah, extending through many years, he had formed an unfavorable opinion of his character, and he cherished a feeling of resentment against him. These sentiments were shared by James Leonard, the brother to whom the estate was devised, and when the conduct of Alvah was the subject of conversation between the brothers,

James freely expressed his antipathy to Alvah. It does not appear that the disposition of the property of the deceased was ever mentioned by James, or that James attempted to influence his brother Joseph in any way concerning such disposition. It was not shown that he advised Joseph to make a will, and it was proved that he was ignorant of the fact that a will had been made until January 5, 1895, some six years after its execution. The deceased, during his life, manifested but little affection for the children of his sister, and their habits and behavior were severely commented on by him. But these impressions were the result of his own observation and experience, and there was no evidence that they had been artfully or wrongfully created by another, who wished thereby to influence the mind of the deceased and to divert from any of these relatives such portion of his estate as the deceased would otherwise have bestowed upon them. It cannot be said that the disposition made of his estate by the ⁷⁵ deceased was an unnatural one. He had neither wife nor child, so that his property, if not disposed of by will, would have been scattered among collateral relatives. He had the right to favor those whom he loved and trusted, and from whom he had received nothing but respect and kindness, and to disappoint the expectations of other relatives who had, justly or unjustly, incurred his ill-will or aversion. The fact that some of the relatives of the deceased were needy is, of itself, entitled to little weight.

In *Goodbar v. Lidikey*, 136 Ind. 1, 43 Am. St. Rep. 296, this court said, on page 6: "Indeed, we think that the presumption in favor of the validity of a will should be increased rather than diminished from the circumstance that a bequest was made to one with whom the testator had maintained intimate and confidential relations during life. A will, in fact, is usually made in order to give property to those whom the testator desires to favor. If it were the desire that the property should go in due proportions to those equally related to the testator, then no will would be necessary. The law itself would make such distribution in the most equitable manner possible. This is particularly the case where, as in this case, the testator had neither wife nor children, and his property, if not devised, would go to collateral relations."

There was no evidence whatever that the deceased was by any means constrained to do what was against his will, and what he would not do if left to himself. There was here neither coercion nor fraud. The will of the deceased faith-

fully reflected his desires, his passions, his prejudices, and not the desires, passions, or prejudices of another. He kept it by him for more than six years, and his purposes, as expressed in the will, remained steadfast during all that time. When his life and strength were ebbing away he spoke of his will, but intimated no inclination to alter or revoke it. Under this state of the evidence the duty of the court was clear, and it did right in withdrawing from the jury the question of undue influence.

The third point made by counsel for appellants is that the court erred in giving to the jury instruction No. 15, in these words: "A person who attaches his name as a witness to a testamentary instrument impliedly certifies that the testator is of sound mind and competent to make a will; and while the law will subsequently permit him to testify to the contrary, because the truth, if such it be, should be learned, yet the jury trying the case may consider the fact of such implied contradiction in weighing his testimony."

It is said by counsel that "this instruction is erroneous: 1. Because it does not state the law correctly; and 2. Even if it is correct in the abstract, it usurps the province of the jury in determining a question of fact, and in passing upon the credibility of a witness of which the jury is the exclusive judge." While it is not necessary to the validity of a will that the subscribing witnesses should know that the instrument they attest is a will, yet, in the absence of proof to the contrary, they will be presumed to have had such knowledge when they attested it. The view of the law contained in the above instruction is sanctioned by very high authority. In *Schribner v. Crane*, 2 Paige, 147, 21 Am. Dec. 81, Chancellor Walworth said: "No person is justified in putting his name as a subscribing witness to a will, unless he knows from the testator himself that he understands what he is doing. The witness should also be satisfied, from his own knowledge of the state of the testator's mental capacity, that he is of sound and disposing mind and memory. By placing his name to the instrument, the witness, in effect, certifies to his knowledge of the mental capacity of the testator; and that the will was executed by him freely and understandingly, with a full knowledge of its contents. Such is the legal effect of the signature of the witness when he is dead, or is out of the jurisdiction of the court."

"It seems to be supposed," says Judge Redfield, "that they [the subscribing witnesses to a will] are only witnesses to

⁷⁷ the act of signing. But when it is considered that the witnesses to a will must certify to the capacity of the testator, as well as to the act of execution, the transaction begins to assume a somewhat different aspect. One who puts his name as a witness to the execution of a will while he was conscious that the testator was not in the possession of his mental faculties, places himself very much in the same attitude as if he had subscribed as witness to a will which he knew to be a forgery, which every honorable man could only regard as becoming accessory to the crime by which the will was fabricated; so that it is not improbable that the want of proper appreciation of the discredit resulting from the act of becoming a witness to the execution of a will, by one confessedly incompetent to the proper understanding of the instrument, may, and probably does, result chiefly, with us, from the general misapprehension of the law upon the subject, rather than from any settled disposition to disregard its dictates if correctly understood": 1 Redfield on Wills, 96, note.

Lord Camden early pointed out how peculiar a stress the statute of frauds had laid upon the quality and office of the witnesses to a will as distinguished from other transactions. He says: "And the only question that can be asked in this case is, Was the testator in his senses when he made it? And consequently, the time of execution is the critical minute that requires guard and protection. Here you see the reason why witnesses are called in so emphatically. . . . Who, then, shall secure the testator in this important moment from imposition? Who shall protect the heir at law and give the world a satisfactory evidence that he was sane? The statute says, three credible witnesses. What is their employment? I say, to inspect and judge of the testator's sanity before they attest": *Hindson v. Kersey*, 4 Burn Eccl. 119.

In *Tatham v. Wright*, 2 Russ. & M. 1, where two subscribing witnesses had declared that they would testify against the testator's capacity, Tindal, C. J., made this severe ⁷⁸ comment: "The real question is, whether these witnesses are to be believed upon this evidence in contradiction to their own solemn act in the attestation. . . . That is the problem to be solved."

A writer of great authority says: "The signature of an attesting witness, when proved, is evidence of everything upon the face of the instrument, for it is to be presumed that the witness would not have subscribed his name in attestation of

that which did not take place; and where there are several attesting witnesses, all of whom are accounted for, proof of the handwriting of any one is sufficient without proving that of the rest": Starkie on Evidence, 10th Am. ed., 519.

The same author says elsewhere: "The law requires the testimony of the subscribing witness, because the parties themselves, by selecting him as the witness, have mutually agreed to rest upon his testimony in proof of the execution of the instrument, and of the circumstances which then took place, and because he knows those facts which are probably unknown to others": Starkie on Evidence, 10th Am. ed., 504; Chaplin on Wills, 92.

In Schouler on Wills, section 181, this sensible observation is found: "One should only subscribe as witness when he can conscientiously testify without reserve in favor of the will, and its proper execution; and it is for the true interest of every rational testator to procure witnesses who will stand resolutely by the transaction against all insidious or open opposition to the probate": Pence v. Waugh, 135 Ind. 143, 155.

It cannot be thought possible that an honest man, of ordinary intelligence, would subscribe his name as a witness to an instrument executed by a person whom he believed to be of unsound mind or under coercion or constraint. The fact that such a man voluntarily identifies himself with the transaction as a witness is an indication that, in his opinion, the person executing the instrument is competent to do so. The witness must be understood to attest not merely the act of signing, but also the mental capacity of the testator to sign. A subscribing witness may, it is true, be heard to impeach the will; but if he assumes that attitude toward it, he does so at the peril of his reputation for candor and veracity. Such an attitude is not merely inconsistent with the position he has voluntarily taken, but is suggestive of fraud and double dealing. It involves a betrayal of confidence, and if the witness is believed in some instances, it may be attended with the most distressing consequences. The credibility of the witness becomes at once a matter of serious inquiry, and his desertion of his position as a sustaining witness is an important fact for the consideration of the jury. In such a case, it is entirely proper for the court to inform the jury that they may consider the fact of such implied contradiction, if they find that it exists, in weighing his testimony. A direction of this character is not an invasion of the province of the jury; nor is it objection-

able on the ground that it singles out a witness for attack or criticism. It is the duty of the court, in all cases, to instruct the jury upon the law of the case, whether the testimony of one witness or the testimony of a score of witnesses is comprehended within the rules necessary to be stated for their guidance.

In the instruction under examination, the court did nothing more than declare, as it was competent for it to do, a familiar rule of law, leaving the application of it entirely to the jury, and without giving them to understand what his own opinion on the subject was: *Commonwealth v. Selfridge*, 1 Horr. & Th. 1.

"The court should not express any opinion on the weight of evidence, nor on the credibility of particular witnesses. . . . But general rules for weighing and reconciling the evidence, and as to what the jury may consider in determining the credibility of witnesses, so long as the court does not trench upon the province of the jury, may properly be ^{so} given in almost every case": *Elliott's General Practice*, sec. 901, and cases cited in note 1.

Undue prominence was not given in this instruction to any particular portion of the evidence, nor was the attention of the jury directed to an isolated and prominent feature of the testimony in such a manner as to mislead them, or indicate the opinion or bias of the court, to the injury of the appellants. The wholesome rules stated in the cases referred to by counsel for appellants were not violated, nor did the court in any respect usurp the functions of the jury. There was no dispute as to the fact that one of the subscribing witnesses was called by appellants, and that his testimony tended to impeach the will. The court might, with propriety, have said much more than it did; it could not, in justice to the parties, have said less, or stated an indisputable rule more fairly: *Paris v. Strong*, 51 Ind. 339; *Stanley v. Montgomery*, 102 Ind. 102; *Union etc. Co. v. Buchanan*, 100 Ind. 63, 81; *Finch v. Bergins*, 89 Ind. 360; *Cheatham v. Hatcher*, 30 Gratt. 56, 32 Am. Rep. 650; 25 Am. & Eng. Ency. of Law, 1017, note 2; 29 Am. & Eng. Ency. of Law, 203, note 1.

In connection with instruction No. 15, the court, by instruction No. 17, clearly admonished the jury that they were the exclusive judges of the weight of the evidence, and that the court had no right to invade their province of determining what the evidence proved. They were further told that they

had the right to decide upon the credibility of each witness. In the light of the authorities which we have cited, it is evident that the jury were properly instructed, and that there was no error in this part of the proceedings of the court.

It was also assigned, as a ground for a new trial, that the court permitted the following evidence to be given to the jury over the objection of the appellants: "Q. State what, if anything, he [Alvah] was saying to the crowd about the conduct of his brother Joseph in that partnership transaction. ⁸¹ A. Mr. Leonard said that his brother Joseph had had an opportunity to take advantage of the other brothers, and that he improved every opportunity, right and left, and that he had robbed the other brothers of what was justly due them, and a variety of expressions of that sort, and he seemed very much excited about the matter, and talked in rather a loud tone of voice for him."

It is objected that this evidence was inadmissible for any purpose, but we cannot so regard it. The theory of the appellants was that the unfriendly feelings entertained by the deceased toward his brother Alvah were the result of mere delusions of fancy, and were without substantial foundation in point of fact. Much testimony was introduced by appellants to show the existence of these unnatural sentiments, and, on the other hand, the appellees undertook to account for them by proving that Alvah's conduct in various business transactions had created enmity between him and Joseph. The actual state of the relations between Alvah and Joseph, therefore, became a material fact in the case, and proof that Alvah reciprocated the feelings of distrust and dislike cherished by his brother Joseph, and that he publicly denounced Joseph as a dishonest and unscrupulous man, was entitled to some weight upon the question whether Joseph's aversion for Alvah was but the hallucination of an enfeebled or distracted mind. It was not necessary, in our judgment, for the appellees to show that the accusations made by Alvah came to the knowledge of Joseph before the latter made his will. The state of Joseph's feelings toward Alvah was established. The attitude of Alvah toward Joseph was an important factor in the investigation of the question whether Joseph's dislike of Alvah was natural or unnatural; whether it sprang from a collision of views and interests in real transactions or was the offspring of a mental malady. We think the evidence was properly admitted, and that, as an indirect and collateral fact, it had a tendency ⁸² to

establish the reasonableness of the conduct and sentiments of Joseph Leonard toward his brother Alvah.

In the next place, the appellants complain of the answer of Dr. Beer, an expert, to a question touching the mental condition of the deceased. The question and answer were as follows: "Q. Now, Doctor, let me ask you this question. Whether from your conversation with him, and from an examination of him, his appearance, and everything at that time, whether Joseph Leonard, on the twelfth day of December [the date of the will] was or was not laboring under an insane delusion, or anything of that kind?" To which question the witness answered: "No, he was not." Appellants excepted to this question and answer. The objection is made that the answer of the witness is the statement of a fact, and not the expression of an opinion. This construction of the answer seems to us entirely without warrant. The witness having been shown to possess the requisite qualifications of an expert, and having seen, conversed with, and examined the supposed testator, was authorized by the rule of evidence applicable in such cases to express his opinion as to the soundness of the mind of the deceased. His answer was in the usual form, and could not have been understood by the court or jury as anything more than an opinion, as all such evidence in inquisitions of this character must necessarily be. There was no error in the action of the court upon the exception to this evidence.

The last alleged error discussed by counsel for appellants is the refusal of the court to set aside the verdict because of the supposed misconduct of one of the jurors. This question, however, was tried in the court below upon affidavits and counter-affidavits, and we must presume, in the absence of a very clear showing to the contrary, that the decision of the trial court was correct. It is proper to add that the record shows that the affidavit filed in support of appellant's motion was made upon information only, and that it was directly contradicted not only by the affidavit of the juror, ^{as} but also by the affidavit of the person from whom the pretended information was alleged to have been derived.

Other errors are assigned, but as they are not discussed by counsel for appellants, they must be treated as waived. Finding no available error in the record, the judgment is affirmed.

Subscribing Witnesses to Wills, Their Competency, and the Effect of Their Evidence, Supporting or Opposing a Will.*

Requisite Number of Subscribing Witnesses.—It is indispensably necessary to the due execution of a will that it be signed or subscribed by the number of witnesses required by the statute. In some of the states the minimum number is two: *Rigg v. Wilton*, 13 Ill. 15, 54 Am. Dec. 419; *Simmons v. Leonard*, 91 Tenn. 183, 30 Am. St. Rep. 875; in others it is three; *Kitchens v. Kitchens*, 39 Ga. 168, 99 Am. Dec. 453; *Sullivan v. Sullivan*, 106 Mass. 474, 8 Am. Rep. 356; note to *Jackson v. Woods*, 1 Johns. Cas. 163. And the attestation of a will by a subscribing witness must be either by signing his name or by making his mark, when his name is written by another for him. It is not sufficient that his name was written by another for him, though at his request and in his presence, if he did not make his mark thereto. So, one competent to be a subscribing witness to a will cannot perform the act of subscription by another, who is legally incompetent to be a witness. Hence, if the name of a witness is subscribed by a devisee, such subscription is void: *Simmons v. Leonard*, 91 Tenn. 183, 30 Am. St. Rep. 875.

The Competency of Attesting Witnesses to a will, where the statute requires it to be subscribed by "competent" witnesses, is not to be determined upon the state of facts existing at the time when the will is presented for probate, but upon those existing at the time of the attestation: *Gillis v. Gillis*, 96 Ga. 1, 51 Am. St. Rep. 121; *In re Holb's Will*, 56 Minn. 33, 45 Am. St. Rep. 434; *Hawes v. Humphrey*, 9 Pick. 350, 20 Am. Dec. 481; *Patten v. Tallman*, 27 Me. 17; *Sullivan v. Sullivan*, 106 Mass. 474, 8 Am. Rep. 356; *In re Sullivan's Will*, 114 Mich. 189; *In re Will of Ingalls*, 148 Ill. 287. The competency of a witness attesting a will is to be tested by the state of facts existing at the time of the attestation, and not by the state of facts existing at a time when interested persons seek to contest the validity of the will: *Shingloff v. Bruner*, 174 Ill. 561, 568. If a sufficient number of witnesses attest a will, and are at that time competent, it remains valid, although death or supervening disability may render any or all of them incapable, in fact, of testifying when the will is offered for probate: *Gillis v. Gillis*, 96 Ga. 1, 51 Am. St. Rep. 121. An attesting witness to a will must be competent at the time of attestation. If then competent, his subsequent incompetency, from any cause, will not prevent the probate of the will, if it can be otherwise satisfactorily proved. The rule of competency, in such cases, is defined by statute in some of the states: *In re Holt's Will*, 56 Minn. 33, 45 Am. St. Rep. 434; *In re Sullivan's Will*, 114 Mich. 189.

*REFERENCE TO MONOGRAPHIC NOTES.

Attorneys as witnesses: 66 Am. St. Rep. 213-243.
Proving will by one witness: 15 Am. Dec. 127, 128.

"Credible Witnesses."—It is sometimes required by the statute that a will shall be attested by a certain number of "credible witnesses," and the expression, as thus used, means competent witnesses: *Fisher v. Spence*, 150 Ill. 253, 41 Am. St. Rep. 390; *Hawes v. Humphrey*, 9 Pick. 350, 20 Am. Dec. 481; *In re Noble*, 124 Ill. 266; *Warren v. Baxter*, 48 Me. 193; *Nixon v. Armstrong*, 38 Tex. 297; *Jones v. Larrabee*, 47 Me. 474; *Hall v. Hall*, 18 Ga. 40; *Sparhawk v. Sparhawk*, 10 Allen, 156; *Brown v. Pridgen*, 56 Tex. 124; that is, witnesses who were competent to testify at the time of the attestation: *Estep v. Morris*, 38 Md. 417, 424; *Hawes v. Humphrey*, 9 Pick. 350, 20 Am. Dec. 481; *Higgins v. Carlton*, 28 Md. 115, 92 Am. Dec. 666; *Haven v. Hilliard*, 23 Pick. 10; *Taylor v. Taylor*, 1 Rich. 531; *Workman v. Dominick*, 3 Strob. 589; *Warren v. Baxter*, 48 Me. 193. A witness is admissible to prove the execution of a will, "whom the law will trust to testify to a jury": *Amory v. Fellowes*, 5 Mass. 219, 229; *Sparhawk v. Sparhawk*, 10 Allen, 155, 156. The requirement of the statute that a will shall be attested by a certain number of "credible witnesses" means that it shall be attested by such persons as are not disqualified from testifying in courts of justice by reason of mental incapacity, interest, the commission of crime, or other cause excluding them from testifying generally, or rendering them incompetent in respect to the particular subject matter or the particular suit: *Fuller v. Fuller*, 83 Ky. 345; *In re Noble*, 124 Ill. 266, 270.

Competent Witnesses, Who Are, Generally.—In Louisiana, women cannot be subscribing witnesses to a will: *Succession of Eubanks*, 9 La. Ann. 147; *Succession of Roth*, 81 La. Ann. 315. A deaf person is also disqualified from being a witness to a testament. A witness who does not understand the language in which a will is dictated and written down is "intellectually deaf." Hence, a person who neither understands nor speaks the French language is not competent to witness a will framed in that language: *Succession of Dauterive*, 39 La. Ann. 1092. The presumption is that a person under fourteen years of age is incompetent, from defect of understanding, to attest the execution of a will, but those supporting the will may rebut this presumption: *Carlton v. Carlton*, 40 N. H. 14.

In general, however, the competency of a witness is presumed, and the burden is upon the party objecting to him to make his incompetency clearly appear: *Perline v. Grand Lodge A. O. U. W.*, 48 Minn. 82, 91. A "credible" attesting witness of a will is a person who, at the time of the attestation, was a person competent to be sworn and to testify in a court of justice: *Carlton v. Carlton*, 40 N. H. 14. An "escribano" may act, under the civil law, in the double capacity of escribano and witness, in the execution of a will; and, in the early history of California, a will was valid, though one of the three subscribing witnesses to it was an alcalde of the place: *Panaud v. Jones*, 1 Cal. 488. A judge of

probate is a good witness to a will: *McLean v. Barnard*, 1 Root, 462; *Ford v. Ford*, 2 Root, 232; and so is a person who has been convicted of crime, but fully pardoned therefor: *Diehl v. Rodgers*, 169 Pa. St. 316, 47 Am. St. Rep. 908. A person whose name is written by another, but who makes his mark thereto, is a good subscribing witness to a will: *Ford v. Ford*, 7 Humph. 91; *Gillis v. Gillis*, 96 Ga. 1, 5, 51 Am. St. Rep. 121, 124, and numerous cases there cited; *Simmons v. Leonard*, 91 Tenn. 183, 30 Am. St. Rep. 875; *Lord v. Lord*, 58 N. H. 7, 42 Am. Rep. 565. A statute providing that an illiterate or infirm witness is competent to attest a will by his mark, "provided he can swear to the same," means that, to be so competent, he must be competent as a witness to testify in a court of law at the time of attesting the will, and not that he must be competent to swear to or identify his mark at the time the will is offered for probate. His competency at the latter time is immaterial, for if he is then incompetent, the fact that he made the mark may be proved by other witnesses: *Gillis v. Gillis*, 96 Ga. 1, 51 Am. St. Rep. 121.

A paper purporting to be a will and signed by three attesting witnesses is admissible in evidence as a will, under a statute requiring that it shall have at least three competent witnesses, although one of the witnesses was an attorney at law, who prepared the paper and signed it as an attesting witness at the request of the testator; and, when the will is offered for probate, the attorney is competent to testify as to the testator's mental condition, the latter's knowledge or ignorance of the contents of the paper, and as to what was done at the time of its execution. The existence of a statute declaring "that no attorney shall be competent or compellable to testify in any court in this state for or against his client, to any matter or thing, knowledge of which he may have acquired from his client by virtue of his relations as attorney," does not, in such a case, render incompetent the attorney's testimony, where he is called upon to state what occurred at the time of the execution of the will, as he would not be testifying "for or against his client," or for or against the interests of the client's estate: *O'Brien v. Spalding*, 102 Ga. 490, 66 Am. St. Rep. 202. If an attorney at law is consulted, with respect to a testamentary disposition of property, in the capacity of a friend, and not as a legal adviser, is nominated executor, and he makes and delivers to another person a memorandum from which a will is subsequently drafted by the latter, there is no relationship of attorney and client between the attorney and the testator as to the preparation of the will, and the attorney is a competent witness as to what occurred at the time of such consultation: *O'Brien v. Spalding*, 102 Ga. 490, 66 Am. St. Rep. 202. Compare the monographic note to this case, on attorneys as witnesses, where it is said at page 229: "After a testator's death, and when his will is presented for probate, there seems to be no good

reason why his attorney who had drawn it should not be allowed, as a matter of public policy, to testify as to the directions given him by the testator, so that it may appear whether the instrument presented for probate is or is not the will of the alleged testator; although, while the testator lives, the attorney drawing his will would not be allowed, without the consent of the testator, to testify to communications made to him concerning it or to the contents of the will itself."

A person is not rendered incompetent to be a witness to a nuncupative will, through a mere defect of hearing or of sight: *Major v. Esneault*, 7 La. Ann. 51. And the fact that a subscribing witness to a will has taken from the executor therein named a lease of personal property belonging to the estate, does not disqualify him as a witness for proving the will: *Seguine v. Seguine*, 2 Barb. 335, 396. The testimony of a subscribing witness to a will who recognizes his signature and those of the other two witnesses, but who has no recollection of the actual signing or of acquaintance with the testator, that he never witnessed a will outside of his bank, is competent: *Barbour v. Moore*, 10 App. D. C. 30.

Competency as Affected by Interest.—It is sometimes prescribed by statute that a will must be signed by a certain number of "disinterested" witnesses: *Simmons v. Leonard*, 91 Tenn. 183, 30 Am. St. Rep. 875; and a will is not well executed where it is subscribed by a witness who has an interest in lands devised at the time of attestation: *Allison v. Allison*, 4 Hawks, 141. At common law, the interest of a witness, to be disqualifying, must be a present, certain, and vested interest: *Lord v. Lord*, 58 N. H. 7, 42 Am. Rep. 565; *Hawes v. Humphrey*, 9 Pick. 350, 20 Am. Dec. 481; *Warren v. Baxter*, 48 Me. 193; *Will v. Sisters*, 67 Minn. 335. Hence, the brother and heir at law of an executrix, having no such interest, is a competent and "credible" witness to attest the will: *Lord v. Lord*, 58 N. H. 7, 42 Am. Rep. 565. A disinherited heir at law is also a competent witness in support of the will, by which he is disinherited: *Smalley v. Smalley*, 70 Me. 545, 35 Am. Rep. 353; *Sparhawk v. Sparhawk*, 10 Allen, 155; and a testator's son, to whom no lands are devised by the will, is a competent subscribing witness, although it might be to his interest to have the will set aside and take the lands by descent: *Allen v. Allen*, 2 Over. 172. An heir for whom no provision is made in the will is a competent subscribing witness thereto, as he has no beneficial interest: *In re Will of Hoppe*, 102 Wis. 54. So with a presumptive heir to the devise: *Old v. Old*, 4 Dev. 500; and also where the subscribing witness' interest in the devised land was acquired, after the testator's death, by inheritance from the devisee: *Maxwell v. Hill*, 89 Tenn. 584. A devisee under a will is not a competent witness to prove its execution: *Crowley v. Crowley*, 80 Ill. 469; but the husband of the testator's sister, who takes no interest under her

brother's will as devisee, legatee, heir, or executrix, is competent to attest the will: *Slingloff v. Bruner*, 174 Ill. 561. The mere fact that a person has pleaded guilty to an indictment for forgery does not render him incompetent to witness a will: *In re Noble*, 124 Ill. 266, 270.

"It was," says Brickell, C. J., in *Kumpe v. Coons*, 63 Ala. 448, 453, "the policy of the common law, as far as possible, to remove from witnesses all temptation to bias or perjury. It was inconsistent with this policy to allow a will to be established or supported by the testimony of persons taking benefits under it. A will, written or prepared by a legatee or devisee, was, and is, regarded with jealousy, not to say suspicion. Attesting witnesses, it was said, were called around the testator to ascertain and testify to his sanity, to guard him from fraud, imposition, or undue influence. Therefore, the common law, if there were not, without the devisee or legatee attesting the execution of the will, a sufficient number of subscribing witnesses without interest and competent, sacrificed, not the gift or devise to the attesting witness, but the whole will; there was no gift or devise which could disappoint the heir at law or his inheritance or the next of kin of the shares which the statute of distributions appointed them to take. Inconvenience resulted from the holding of wills of freeholds to be invalid because of the interest of a subscribing witness. Legislation intervened, and the statute of 25 George II was passed, which deprived the devisee or legatee of his interest or benefit under the will; and by the deprivation, removing temptations to fraud or perjury springing from interest, rendered him a competent attesting witness." Similar statutes have been passed in some of our states: *Estep v. Morris*, 38 Md. 417, 425; *Mercer v. Mackin*, 14 Bush, 434, 438; *Will v. Sisters*, 67 Minn. 335; *Nixon v. Armstrong*, 38 Tex. 297. It seems that the common law required no particular or special qualifications in persons to enable them to be attesting witnesses to wills. No difficulty was presented until the testator died; the will took effect and the attesting witnesses were recalled to prove the will. The rule of the common law then interposed and prevented all parties who were interested in the matter or proceeding then pending from testifying therein. Any person who was not infamous, insane, or so young as to be wanting in discretion was a competent subscribing witness to a will at the time of attestation, because at that time no one could have any fixed interest under the will, as it might be altered or destroyed at any time during the testator's life. It was only after the testator's death that the will took effect and the rights and interests of legatees and others vested, and they then became incompetent to prove the will by reason of their interest: *Per Grason, J.*, in *Estep v. Morris*, 38 Md. 417, 425.

Upon the theory that a pecuniary interest disqualifies a witness, a devisee or legatee has been held incompetent as a witness to

attest or prove up the will under which he receives a benefit: *Trotters v. Winchester*, 1 Mo. 413; *Snelgrove v. Snelgrove*, 4 Deaus. 274; *Vrooman v. Powers*, 47 Ohio St. 191. But incompetency on account of interest has been swept away by statute in some of the states, and parties who take an interest under a will are competent witnesses to prove it, though they were subscribing witnesses thereto: *Estep v. Morris*, 38 Md. 417, 425; *Milton v. Hunter*, 13 Bush, 163, 169; *Cave v. Cave*, 13 Bush, 452; *Mercer v. Mackin*, 14 Bush, 434; *Kumpe v. Coons*, 63 Ala. 448, 456. A devisee, however, who is an attesting witness and, as such, proves the execution of the will, thereby renders the devise to himself void: *Mercer v. Mackin*, 14 Bush, 434, 438; but a beneficial provision in a will in favor of a subscribing witness is not rendered void by the New York statute, even where he was examined as such on the probate, if his examination was unnecessary and the will could be proved by another witness: *Cornwell v. Wooley*, 1 Abb. App. Dec. 441. Section 8 of the Illinois statute of wills provides, in substance, that any beneficial devise, legacy, or interest made or given to a subscribing witness to the execution of any will, testament, or codicil shall, "as to such subscribing witness, and all persons claiming under him, be null and void." This provision is construed as having no application to the interests of any persons other than those who are attesting witnesses, and does not declare such interests null and void. Nor does the further provision of the statute assume to render competent any subscribing witnesses other than those to whom a beneficial devise, etc., was made or given: *Fisher v. Spence*, 150 Ill. 253, 41 Am. St. Rep. 360. In Missouri, the beneficiaries under a will are competent witnesses in a proceeding to test its validity, notwithstanding a statute concerning witnesses, which provides that where one of the original parties to the cause of action is dead, the other party shall not be permitted to testify: *Garvin v. Williams*, 50 Mo. 206.

If the interest of a subscribing witness be indirect or consequential only, as that of a citizen who is rated for taxes, or a pew-holder in a church, or a member of a society, where the will makes bequests for the benefit of the poor of the county, or to charitable uses of such church or society, and by reason of its indirectness and uncertainty the precise interest of such subscribing witness cannot be measured or ascertained so as to lapse into the estate, such interest does not disqualify the witness, but only goes to his credit: *Jones v. Habersham*, 63 Ga. 146, 151. A "disinterested" witness is one who has no legal interest, such as an employé of a charitable institution to which property has been bequeathed: *Combs' Appeal*, 105 Pa. St. 155. The following persons having no present, certain, or vested pecuniary interest in property devised or bequeathed by will have been held competent attesting witnesses thereto: An inhabitant of a town to which a bequest is made for the support of schools: *Piper v. Moulton*, 72

Me. 155; a tax-paying inhabitant of a town to which there is a bequest or devise in trust: Marston, Petitioner, 79 Me. 25, 47; a member of a parish to which a legacy has been bequeathed, where the member has no other interest in the legacy than as such member: Haven v. Hilliard, 23 Pick. 10; an inhabitant of an incorporated society to whom property is devised for the support of a school: Cornwell v. Isham, 1 Day, 35, 2 Am. Dec. 50; a member of an incorporated religious order to which another member has devised and bequeathed all his property: Will v. Sisters, 67 Minn. 335; a member of a corporation to which property is given by a will in trust for charitable uses: Loring v. Park, 7 Gray, 42; a tax-paying inhabitant of a town and member of a congregational society, to which there has been a devise and bequest for the support of a minister and for the support of schools: Eustis v. Parker, 1 N. H. 273; and one of the original corporators and continuing members of a charitable corporation, to which property has been devised and bequeathed, although such person may have a contingent interest in the property of the corporation upon its possible dissolution: Quinn v. Shields, 62 Iowa, 129, 49 Am. Rep. 141. The privilege of attending public worship and the advantage of education do not constitute such an interest as will disqualify a witness; and the fact that a person is a member of a particular church and society, worshiping in a certain meeting-house, or that he owns a pew in that house, does not of itself create in him any direct, certain, legal, vested personal interest in a legacy to that church and society. Hence, he is not disqualified from witnessing a will in which such bequest is made: Warren v. Baxter, 43 Me. 103. A witness is not incompetent to attest a will because he resides in a portion of a town to which the testator bequeathed certain property through the medium of trustees after a life estate in the testator's wife: Hawes v. Humphrey, 9 Pick. 350, 20 Am. Dec. 481; and the fact that a witness to a will, at the time of its execution, received from the testator a deed of certain land, in settlement of affairs between him and the witness, does not render him an incompetent witness where his mother is the principal devisee under the will: Nash v. Reed, 46 Me. 168.

If a subscribing witness to a will was incompetent, by reason of taking an interest thereunder, at the time of attestation, the attestation is a nullity, and the witness cannot become competent on the probate of the will by releasing his interest thereunder. As we have said above, he must have been competent at the time of attestation. That a release is ineffectual for such a purpose, see Kumpke v. Coons, 63 Ala. 448, 453; Vrooman v. Powers, 47 Ohio St. 191; Workman v. Dominick, 3 Strob. 589; Allison v. Allison, 4 Hawks, 141. Contra, Kerns v. Soxman, 16 Serg. & R. 315. Nor can his incompetency be removed by a renunciation of his interest upon the trial of an issue to contest the will: Vrooman v. Powers, 47 Ohio St. 191. In Texas, it is held that a will

is not void because all of the attesting witnesses are interested therein; that its probate by a legatee who releases the legacy is valid as to all of the will except the legacies to subscribing witnesses; and that the will so proved is void as to such legacies: *Nixon v. Armstrong*, 38 Tex. 297.

Competency of Executors and Their Wives.—One named as an executor in a will of personal property has been held an incompetent witness to attest the same: *Workman v. Dominick*, 3 Strob. 589; because the office of executor, with the commissions legally incident to it, is an office of profit, and the appointment gives to the nominee an interest in the will, disqualifying him from subscribing thereto as a witness: *Taylor v. Taylor*, 1 Rich. 531; *Tucker v. Tucker*, 5 Ired. 161; *Morton v. Ingram*, 11 Ired. 368; *Gunter v. Gunter*, 3 Jones, 441; *Mathis v. Guffin*, 8 Rich. Eq. 79; *Wilkins v. Taylor*, 8 Rich. Eq. 291; and which he cannot renounce and release so as to make himself a competent witness at the time of the attestation: *Gunter v. Gunter*, 3 Jones, 441; *Morton v. Ingram*, 11 Ired. 368; *Workman v. Dominick*, 3 Strob. 589. But the prevailing opinion is that an executor named in a will is a competent witness to support it on the probate thereof, where he is one of the subscribing witnesses thereto: *Henderson v. Kenner*, 1 Rich. 474; *Wyman v. Symmes*, 10 Allen, 153; *Rugg v. Rugg*, 21 Hun. 383; *Estate of Levy*, 1 Tuck. 87; *Harper v. Harper*, 1 Thomp. & C. 351; *Jones v. Larrabee*, 47 Me. 474; especially where he takes no benefit under the will: *Richardson v. Richardson*, 35 Vt. 238; *Panaud v. Jones*, 1 Cal. 488; *Meyer v. Fogg*, 7 Fla. 292, 68 Am. Dec. 441. An executor named in the will has no such interest in the estate as to make him incompetent to be an attesting witness to the will: *Wyman v. Symmes*, 10 Allen, 153; and whatever interest, be it official or other, which the executor derives from his being nominated in the will is frustrated by the operation of the statute in many jurisdictions: *Harleston v. Corbett*, 12 Rich. 604, 607; *Estep v. Morris*, 38 Md. 417; *Noble v. Burnett*, 10 Rich. 505; *Murphy v. Murphy*, 24 Mo. 526. An executor is not an incompetent witness to a will unless he is a legatee or devisee, or has an interest in the estate bequeathed to him. His interest to the extent of commissions to which he may be entitled as executor will not be such as will exclude him: *Meyer v. Fogg*, 7 Fla. 292, 68 Am. Dec. 441. And where he is to be given a fixed sum in addition to whatever his commissions may be for his services "in taking care of and settling the estate," this does not make him interested in the event of the probate proceedings as a legatee under the will, because he renders services for the sum so given: *Reeve v. Crosby*, 3 Redf. 74. An executor is a "disinterested" witness: *Jordan's Estate*, 161 Pa. St. 393. Furthermore, where the statute allows parties in interest to testify, an executor named in a will is a competent witness for the purpose of probating it: *Spiegelhalter's Will*, 1 Pennewill (Del.), 5; *Baker v. Bancroft*, 79

Ga. 672. Under the statute of Maryland, a party who takes an interest under a will is a competent witness to prove it; and one who is the executor of a will and also a guardian thereunder of infant devisees is competent to attest the will and to prove it: *Estep v. Morris*, 38 Md. 417. One named as executor in a will is not prohibited, under the laws of New York, from being a witness thereto, nor is he by such laws rendered incompetent as a witness upon probate of the will to prove its execution: *Children's Aid Soc. v. Loveridge*, 70 N. Y. 387, 392.

The executor named in a will being a competent attesting witness thereto, where he has no beneficial interest therein other than the commissions allowed by law for his services, his wife is a competent subscribing witness to the will: *Stewart v. Harriman*, 56 N. H. 25, 22 Am. Rep. 408; *In re Will of Lyon*, 96 Wis. 339, 65 Am. St. Rep. 52; *Piper v. Moulton*, 72 Me. 155. A minor son of a legatee, also named as executor in a will, may be a competent witness to its execution: *Jones v. Tebbetts*, 57 Me. 572.

Competency of Legatees and Devisees—Husband and Wife.—In some jurisdictions a legatee is incompetent as an attesting witness to a will, and it cannot be proved by him on the ground that he is interested: *Starr v. Starr*, 2 Root, 303; *Succession of Hall*, 28 La. Ann. 57; *Trotters v. Winchester*, 1 Mo. 413; and a witness to a codicil who is a legatee under the will is incompetent to prove the codicil or the sanity of the testator at the time of making it: *Gass v. Gass*, 3 Humph. 278. A witness to a will who is "beneficially interested" under it is rendered incompetent, by the statutes of the state of Maine, as a witness to the will: *Appeal of Trinitarian etc. Church*, 91 Me. 416. But in other jurisdictions the interest of a witness does not disqualify him, and a legatee or devisee is a competent witness to attest the will and to establish it: *Gamache v. Gambs*, 52 Mo. 287; *Jones v. Habersham*, 63 Ga. 146; *Harper v. Harper*, 1 Thomp. & C. 351, 359.

It must be borne in mind, however, that while a subscribing witness, who is also a legatee or devisee under the will, is competent, the statute frequently makes the legacy or devise to him void, leaving the other parts of the will to stand: *Jones v. Habersham*, 63 Ga. 146; *Fowler v. Stagner*, 55 Tex. 393; *Nixon v. Armstrong*, 38 Tex. 296, 300. The beneficiary, by the very act of subscribing the will as a witness, avoids the bequest. His competency and credibility as a witness to establish the will are, therefore, "the result of the nullity of the bequest to him": *Fowler v. Stagner*, 55 Tex. 393, 399. A legacy to a subscribing witness to the will is valid, in New York, if the legatee is not sworn as an attesting witness to the execution of the will: *Caw v. Robertson*, 5 N. Y. 125, 133. One who takes a small legacy, depriving him of a larger estate as heir, is a competent attesting witness to the will, for he is not to be regarded as "beneficially interested" thereunder: *Smalley v. Smalley*, 70 Me. 545, 35 Am. Rep. 353. Under the

statute of Missouri the release of a legacy and renunciation of an executorship by an attesting witness to a will restores his competency as such witness: *Grimm v. Tittman*, 113 Mo. 56, 63.

At common law neither husband nor wife is a competent witness to the other's will: *Hodgman v. Kittredge*, 67 N. H. 254, 68 Am. St. Rep. 661. In some of the states a wife is held not to be a competent witness to her husband's will: *Pease v. Allis*, 110 Mass. 157, 14 Am. Rep. 591; and she is held not to be a competent witness to a will containing a devise to her husband: *Sullivan v. Sullivan*, 106 Mass. 474, 8 Am. Rep. 356. The husband or wife of one named as devisee or legatee in a will is not a competent witness to prove the execution of the will, even as to devises and bequests made to persons other than to the wife or husband of such witness, and is not rendered competent by a release by the devisee or legatee of all his or her right, title, interest, and claim under the will: *Fisher v. Spence*, 150 Ill. 253, 41 Am. St. Rep. 360. It is sometimes provided by statute that a husband shall not be a subscribing witness to his wife's will: *Dickinson v. Dickinson*, 61 Pa. St. 401.

Under a statute which provides that any beneficial devise or legacy given in a will to a subscribing witness thereto shall be void unless there are three other competent witnesses to the same, a devise to the wife of one of three subscribing witnesses renders the husband incompetent as a subscribing witness, and the will invalid: *Hodgman v. Kittredge*, 67 N. H. 254, 68 Am. St. Rep. 661. So, under such a statute, a wife was one of the three subscribing witnesses to a will containing a devise to her husband. It was contended that the devise to the husband was a "beneficial devise" to the wife, and therefore void, leaving her a competent attesting witness to the rest of the will; but it was held that the contention could not be maintained, and that, there not being the designated number of competent witnesses required by law, the will was invalid: *Sullivan v. Sullivan*, 106 Mass. 474, 8 Am. Rep. 356. And in Vermont, a will executed and presented for probate, prior to the statute of 1884, was void if one of the three witnesses to it was the husband of one of the legatees: *Giddings v. Turgeon*, 53 Vt. 106. In Ohio, a verbal will respecting personal estate is valid if reduced to writing and "subscribed by two competent disinterested witnesses," but if one of the witnesses is a legatee under the will and the other is his wife, the husband is not a "competent disinterested" witness, and the will is invalid: *Vrooman v. Powers*, 47 Ohio St. 191.

On the other hand are cases holding that a married person is not incompetent to attest a will simply because the husband or wife of such person is a beneficiary under the will, and that he can become incompetent only upon a single contingency, and that is where such interested party shall become a contestant on the subsequent probate of the will: *In re Holt's Will*, 56 Minn. 33, 45

Am. St. Rep. 464. Thus a husband's act in subscribing a will devising real estate to his wife does not disqualify him, on the ground of interest, from being a competent witness in support of the will: *Bates v. Officer*, 79 Iowa, 343; *Lippincott v. Wikoff*, 54 N. J. Eq. 107; and a wife is a competent subscribing witness to a will though her husband is a legatee under it: *Hawkins v. Hawkins*, 54 Iowa, 443. Under the New York statute, similar to that of 25 George II, chapter 6, depriving beneficiaries, who were subscribing witnesses to the will, of their interest thereunder, leaving them competent attesting witnesses, it has been held that where a husband or wife is a witness to a will containing a legacy or devise to the other, such legacy or devise is void, and that the legatee or devisee is a competent witness to the will: *Jackson v. Woods*, 1 Johns. Cas. 163; *Jackson v. Durland*, 2 Johns. Cas. 314. See, also, *Cannon v. Setzler*, 6 Rich. 471. But, under the statutes of Texas, it is held that the wife of a legatee is competent as a subscribing witness to testify to the execution of the will in a proceeding for its probate; that neither her relationship nor her interest affects her competency; and that the will should be admitted to probate without qualification as to the legacy therein contained in favor of the husband: *Gamble v. Butcher*, 87 Tex. 643, 647. So, in Minnesota, it is held that a statute making void a legacy to an attesting witness to a will does not apply to the husband or wife of such witness, as neither has, under existing laws, any present, direct, or certain interest in a legacy to the other: *In re Holt's Will*, 56 Minn. 33, 45 Am. St. Rep. 434. And under a statute which makes a devisee or one beneficially interested in a will disqualified as a subscribing witness thereto, it has been held that the appointment of the husband of a devisee as executor does not disqualify him from attesting the will as a subscribing witness: *Lippincott v. Wikoff*, 54 N. J. Eq. 107, 110.

Proof of Will.—The law does not require a will to be proved as well as attested by a specific number of witnesses. A will may be proved by one witness though it must be attested by two. In other words, the number of witnesses required to prove a will may be less than the number of subscribing witnesses demanded by the statute: *Jesse v. Parker*, 6 Gratt. 57, 52 Am. Dec. 102; *Cheatnam v. Hatcher*, 30 Gratt. 56, 32 Am. Rep. 650; *Lindsay v. McCormack*, 2 A. K. Marsh. 229, 12 Am. Dec. 387; *Lamberts v. Cooper*, 20 Gratt. 61; *Hall v. Sims*, 2 J. J. Marsh. 509; *Harper v. Wilson*, 2 A. K. Marsh. 465; *Mickle v. Matlack*, 17 N. J. L. 86; *Webb v. Dye*, 18 W. Va. 376; *Crusoe v. Butler*, 36 Miss. 150; *Telford v. Barney*, 1 G. Greene, 575, 592. The Pennsylvania statute requires a will to be proved by "two or more competent witnesses," but it does not require, nor is it necessary, that they shall be subscribing witnesses: *Simrell's Estate*, 154 Pa. St. 604, 35 Am. St. Rep. 864; *Derr v. Greenawalt*, 76 Pa. St. 239; *Carson's Appeal*, 50 Pa. St. 498; *Greenough v. Greenough*, 11 Pa. St. 489, 51 Am. Dec.

567; *Jones v. Murphy*, 8 Watts & S. 275, 295; *Hock v. Hock*, 6 Serg. & R. 47.

The general rule is that proof of a will by other than the testimony of a subscribing witness is not permissible where such a witness is known, is a resident of the state, and his evidence can be obtained: *Stow v. Stow*, 1 Redf. 305; *Sweet's Case*, [1891] Prob. 400, 402. All the subscribing witnesses to a will living in the state and competent to testify ought, it has been held, to be sworn and examined before the surrogate when the will is sought to be proved and admitted to probate: *Jauncey v. Thorne*, 2 Barb. Ch. 40, 45 Am. Dec. 424; and in Mississippi a will cannot be admitted to probate unless all the subscribing witnesses, alive and within the control of the process of the court, are produced to testify: *Evans v. Evans*, 10 Smedes & M. 402. A statutory requirement that all the witnesses must be examined applies only where they are all in the state: *Swenarton v. Hancock*, 22 Hun, 38; but the mere absence of a subscribing witness from the state, abroad on a journey or tour, does not authorize proof of the will by proving the handwriting of the testator and of the witness, for such a witness does not reside out of the state: *Stow v. Stow*, 1 Redf. 305. Whatever the practice may require as to calling all of the attesting witnesses, there is no rule of law which requires them all to be examined at the outset. The order in which witnesses shall be called is a matter of discretion with the court, and if proof of the will is sufficiently made by the subscribing witnesses produced, the others need not be sworn: *Howes v. Colburn*, 165 Mass. 385, 386; *Cheatham v. Hatcher*, 30 Gratt. 56, 32 Am. Rep. 650; *Mickle v. Matlack*, 17 N. J. L. 86; *Whitenack v. Stryker*, 2 N. J. Eq. 8; but see *Abbott v. Abbott*, 41 Mich. 540. Proof of a will by one of the attesting witnesses is sufficient if he can testify to a compliance with all the requirements of the statute as to the execution, acknowledgment, and attestation. Any one of the subscribing witnesses may prove the execution of the will and its due attestation by himself and the others, and if his testimony is satisfactory, it is sufficient. If it were otherwise, the proof of a duly attested will might be defeated by the death or forgetfulness of some of the other witnesses: *Jackson v. Vickory*, 1 Wend. 406, 19 Am. Dec. 522; *Cheatham v. Hatcher*, 30 Gratt. 56, 32 Am. Rep. 650; *Mickle v. Matlack*, 17 N. J. L. 86; *Welch v. Welch*, 9 Rich. 133; *Tynan v. Paschal*, 27 Tex. 286, 84 Am. Dec. 619; *Jones v. Roberts*, 96 Wis. 427; *Compton v. Milton*, 12 N. J. L. 70; *Barney v. Chittenden*, 2 G. Greene, 165; *Lamberts v. Cooper*, 29 Gratt. 61; *In re Dockstader*, 6 Dem. (N. Y.) 106; *Dack v. Dack*, 84 N. Y. 663; *Matter of Bernsee*, 141 N. Y. 389; *Overall v. Overall*, Litt. Sel. Cas. 501; *Worsham v. Worsham*, 5 Leigh, 589; *Cowles v. Reavis*, 109 N. C. 417; *Welch v. Welch*, 2 T. B. Mon. 83, 15 Am. Dec. 126, and extended note thereto on proving a will by one witness: *Dewey v. Dewey*, 1 Met. 349, 35 Am. Dec. 367; *Swift v. Wiley*, 1 B. Mon. 114, 116;

Doran v. Mullen, 78 Ill. 342; **Hall v. Sims**, 2 J. J. Marsh. 509; **Gwinn v. Radford**, 2 Litt. 137; **Harper v. Wilson**, 2 A. K. Marsh. 465; **Lindsay v. McCormack**, 2 A. K. Marsh. 229, 12 Am. Dec. 387. Contra, **Burwell v. Corbin**, 1 Rand. 131, 10 Am. Dec. 494. As said in **Barney v. Chittenden**, 2 G. Greene, 165, the probate of a will may be granted upon the testimony of one subscribing witness where it appears to the court that no person interested intends to object to it. Proof of the due execution of a will by at least one subscribing witness is required, by the statute of Texas, if living and within the jurisdiction of the court: **Tynan v. Paschal**, 27 Tex. 286, 84 Am. Dec. 619.

The rule prevalling in the American courts is that a will may be proved by one of the subscribing witnesses if he can testify that all the solemnities required by statute were observed; if not, the other witnesses must be produced, if living and within the jurisdiction of the court: **Jackson v. Le Grange**, 19 Johns. 386, 10 Am. Dec. 237. If the witness can testify only to his own part in the transaction, the other witnesses must be produced, if living and within the jurisdiction of the court: **Jackson v. Vickory**, 1 Wend. 406, 19 Am. Dec. 522. Where three subscribing witnesses are required, the will may be proved by two of them, as well as one, who can testify to the necessary facts: **Deakins v. Hollis**, 7 Gill & J. 311; **Patten v. Tallman**, 27 Me. 17; **McKeen v. Frost**, 46 Me. 239. Two witnesses are required in Tennessee to prove the execution of a will of personalty: **Moore v. Steele**, 10 Humph. 562; but the distinction between wills of realty and personalty does not exist in all of the states. It does not exist under the probate laws of California: **Adams v. De Cook**, 1 McAll. 253.

A lost or destroyed will may be proved, as a rule, by one only or more subscribing witnesses, though it must have been attested by at least two witnesses: **Dan v. Brown**, 4 Cow. 483, 15 Am. Dec. 395; **Skeggs v. Horton**, 82 Ala. 352; **Harris v. Harris**, 26 N. Y. 433; **Wyckoff v. Wyckoff**, 16 N. J. Eq. 401; **Dickey v. Malechi**, 6 Mo. 177, 34 Am. Dec. 130; **Graham v. O'Fallon**, 8 Mo. 507; **In re Harris' Estate**, 10 Wash. 555; **In re Page**, 118 Ill. 576, 59 Am. Rep. 395. The fact that a will is lost does not dispense with proof of facts which must be established in order to give effect to the testamentary disposition if it were produced before the court. Hence, the testimony, whether by one or more witnesses, must show a compliance with the statute relating to its execution: **Tynan v. Paschal**, 27 Tex. 286, 84 Am. Dec. 619; **In re Page**, 118 Ill. 576, 59 Am. Rep. 395; **In re Harris' Estate**, 10 Wash. 555; **Skeggs v. Horton**, 82 Ala. 352. A lost or destroyed will may be established upon satisfactory proof allunde of its loss or destruction, and of its contents or substance; but such proof, whether made by one witness or by many, must be clear, satisfactory, and convincing: **Wyckoff v. Wyckoff**, 16 N. J. Eq. 401, 406; **Coddington v. Jenner**, 57 N. J. Eq. 523. In Georgia, however, the execution of a lost will must be proved by

three subscribing witnesses, if in life and within the jurisdiction of the court, as in the case of the probate of a will in solemn form: *Kitchens v. Kitchens*, 39 Ga. 168, 99 Am. Dec. 453.

If the testimony of the witnesses, whether one or more, and the surrounding circumstances show that all of the solemnities required by statute in the execution, acknowledgment, and attestation of a will have been observed, the will is well proved: *Hayes v. West*, 37 Ind. 21; *Bice v. Hall*, 120 Ill. 597, 693; *Doran v. Mullen*, 78 Ill. 342; *Jackson v. Vickory*, 1 Wend. 403, 19 Am. Dec. 522; otherwise the proof is insufficient: *Jackson v. Le Grange*, 19 Johns. 386, 10 Am. Dec. 237; *Keyl v. Fenchter*, 56 Ohio St. 424, 431; *Burwell v. Corbin*, 1 Rand. 131, 10 Am. Dec. 494; *Johnson v. Dunn*, 6 Gratt. 625; *Chappell v. Trent*, 90 Va. 849; *Remsen v. Brinckerhoff*, 26 Wend. 325, 37 Am. Dec. 251; *Crowley v. Crowley*, 80 Ill. 469; *Sullivan v. Sullivan*, 106 Mass. 474, 8 Am. Rep. 356; *In re Mackay*, 44 Hun, 571. The fact that two of the subscribing witnesses to a will do not swear to all the formalities required by law will not invalidate the will, where the other subscribing witness testifies positively to those formalities, and the certificate of attestation, signed by all of the witnesses, affirms the existence of all the facts requisite to a valid will: *Nelson v. McGiffert*, 3 Barb. Ch. 158, 49 Am. Dec. 170.

Before a will can be admitted to probate in the state of Illinois, subscribing witnesses must, among other things, swear that they believed the testator to be of sound mind and memory at the time the will was signed and attested: *Crowley v. Crowley*, 80 Ill. 469; *Bice v. Hall*, 120 Ill. 597; *Fry v. Morrison*, 159 Ill. 244; *Canatsey v. Canatsey*, 130 Ill. 397. Such belief, so far as belief is concerned, is sufficient to admit the will to probate. The right to probate the will is not dependent upon the belief of the attesting witnesses formed after their attestation: *In re Will of Ingalls*, 148 Ill. 287. If one of the subscribing witnesses testifies that he does not know whether the testator was of sound mind or not—that he might have been or might not—this is insufficient. He should be interrogated as to his belief. While he may have no positive knowledge, he undoubtedly has an opinion which the law requires he should state: *Allison v. Allison*, 46 Ill. 61, 92 Am. Dec. 237; and see *Bice v. Hall*, 120 Ill. 597.

The attesting witnesses of a will are competent, on the trial of a contest thereof in chancery, to testify as to the testator's mental capacity: *Entwistle v. Meikle*, 180 Ill. 9; but the will may be established even against their testimony, and the party sustaining the will is not bound to call them, although a failure to do so, unexplained, might be regarded as a suspicious circumstance: *Rigg v. Wilton*, 13 Ill. 15, 54 Am. Dec. 419; but see *Jauncey v. Thorne*, 2 Barb. Ch. 40, 45 Am. Dec. 424, showing that all the subscribing witnesses to a will, according to the rule of the English court of chancery, must, when a bill is filed to establish a will, be called and examined by the complainant, if they are living and compe-

tent to testify, in order to give the adverse party an opportunity to cross-examine them respecting the sanity of the testator, and the circumstances attending the execution of the will; and that this rule applies to the trial of an issue of *devisavit vel non* out of chancery. This rule is followed in Vermont: *Thornton v. Thornton*, 39 Vt. 122. The laws of Michigan do not require all the subscribing witnesses to be sworn on the contest of a will: *Abbott v. Abbott*, 41 Mich. 540; and, in Wisconsin, a will signed by the testator's mark may be established, even when contested, by the evidence of one subscribing witness and corroborating evidence sufficient to satisfy the court that the statutory requirements were fulfilled, where a satisfactory reason is given for the absence of the witness not produced: *Jones v. Roberts*, 96 Wis. 427, 433. In some of the states, as in England, a witness need not know that the paper he is attesting is a will: *Canada's Appeal*, 47 Conn. 450; *Jauncey v. Thorne*, 2 Barb. Ch. 40, 45 Am. Dec. 424; *Allen v. Griffin*, 69 Wis. 529; *Flood v. Pragoff*, 79 Ky. 607. But in other states, the subscribing witnesses must know that the paper is the last will of the testator, and witness it at his request: *Odenwaelder v. Schorr*, 8 Mo. App. 458.

Evidence—Weight and Effect of Testimony.—A subscribing witness to a will, if in all respects eligible, assumes a "serious duty," and a legal relation thereto necessary to its validity, if there are but two subscribing witnesses and important, however many there may be. This duty he cannot cast off for any cause at his pleasure without the consent of the maker of the will given in his lifetime. Having subscribed as such witness, the law holds him to the legal consequence of such relation, but his liability depends upon his consent to sign as a witness and the fact that he signed as such in the presence of the testator: *Boone v. Lewis*, 108 N. C. 40, 14 Am. St. Rep. 783. A subscribing witness to a will should be satisfied from his own knowledge that the testator understands what he is doing, and is of sound and disposing mind and memory. In some sense, he is made the judge of the testator's sanity. It is his duty to inquire into this matter, and if he thinks that the testator is not capable, he should remonstrate and refuse his attestation: *Scribner v. Crane*, 2 Paige 147, 21 Am. Dec. 81; *Hawes v. Humphrey*, 9 Pick. 350, 20 Am. Dec. 481. A subscribing witness not personally satisfied of the testator's mental capacity, and that he executed the will freely and understandingly, knowing its contents, is incompetent to prove the due execution of the will. It is, in fact, a fraud upon those whose rights are affected thereby to place his name to a testamentary paper under such circumstances: *Scribner v. Crane*, 2 Paige, 147, 21 Am. Dec. 81, and note thereto.

A subscribing witness must be able to identify the will: *Simmons v. Leonard*, 91 Tenn. 183, 30 Am. St. Rep. 875; and proof of instructions for, or the reading of, the will is necessary where the capacity of the testator is in any degree of doubt: *Tomkins v.*

Tomkins, 1 Ball. 92, 19 Am. Dec. 656. It is not proper, upon the probate of a will or on an appeal from an order allowing it, to fully investigate the question of the testator's sanity, and the testimony of the subscribing witnesses only is admissible on that question, as a probate proceeding is intended by the statute to be summary: Succession of Eubanks, 9 La. Ann. 147; Crowley v. Crowley, 80 Ill. 469; Bice v. Hall, 120 Ill. 597. Nor is it proper, on the probate of a will, to permit persons interested in resisting it to introduce evidence to contest its validity: In re Will of Hathaway, 4 Ohio St. 883. And the act of attesting a will is not a "personal transaction" with the deceased: In re Young's Will, 123 N. C. 358, 360. But on an appeal denying the probate, the party seeking it is not confined to the testimony of the attesting witnesses to establish the execution of the will or the sanity of the testator: Crowley v. Crowley, 80 Ill. 469. A statute requiring at least two of the subscribing witnesses to a will to be produced and examined, if so many are within the state and competent and able to testify, before the instrument shall be admitted to probate, does not require that each or any of the witnesses shall testify that there has been a compliance with the statutory requirements: In re Graham's Will, 9 N. Y. Supp. 122.

The fate of a will does not depend entirely upon the testimony of the subscribing witnesses. The testimony even as to the factum of execution is not confined to them. "The fact to be established is the proper execution of the will. If that is proved by competent testimony, it is sufficient, no matter from what quarter the testimony comes, provided the attesting witnesses are among those who bear testimony or their absence is explained. The inquiry, as in other cases, is whether, taking all the testimony together, the fact is duly established. It is not required that any one or more of the essential facts should be proved by all, or any number, of the attesting witnesses. The right is simply to have the attesting witnesses examined, no matter what their testimony may be. The law does not allow proof of the valid execution and attestation of a will to be defeated at the time of probate by the failure of the memory on the part of any of the subscribing witnesses": Gillis v. Gillis, 96 Ga. 1, 15, 51 Am. St. Rep. 121, 131, and cases there cited; Abbott v. Abbott, 41 Mich. 540; Estate of Tyler, 121 Cal. 405; Cheatham v. Hatcher, 30 Gratt. 56, 32 Am. Rep. 650; Verdier v. Verdier, 8 Rich. 135; Watkins v. Watkins, 13 Rich. 66; Gable v. Ranch, 50 S. C. 95; Jackson v. Betts, 6 Cow. 377; Dan v. Brown, 4 Cow. 483, 15 Am. Dec. 395; Will of Meurer, 44 Wis. 393, 28 Am. Rep. 591; Vernon v. Kirk, 30 Pa. St. 218; McKee v. White, 50 Pa. St. 354; Kirk v. Carr, 54 Pa. St. 285; Rugg v. Rugg, 83 N. Y. 592; In re Will of Kellum, 52 N. Y. 517; Peck v. Cary, 27 N. Y. 9, 84 Am. Dec. 220; note to Chaffee v. Baptist etc. Convention, 40 Am. Dec. 232; Remsen v. Brinckerhoff, 26 Wend. 325, 37 Am. Dec. 251; Elliot v. Elliot, 10 Allen, 357; Hobart v. Hobart, 154 Ill. 610, 45 Am.

St. Rep. 151; Thompson v. Leastedt, 6 Thomp. & C. 78, 3 Hun, 395; note to Peck v. Cary, 84 Am. Dec. 241. And this rule applies upon the contest of a will: Will of Meurer, 44 Wis. 393, 28 Am. Rep. 591; or issue of devisavit vel non: McKee v. White, 50 Pa. St. 354.

Thus, if three competent witnesses sign a will as "witness to signature," with nothing further, it may be admitted to probate, although neither of the two surviving witnesses remembers any circumstance under which the instrument was executed: *Elliot v. Elliot*, 10 Allen, 357. The testimony of a subscribing witness to a will thirty years old should be received, though he cannot recollect all the particulars attending the execution; and the jury may give it such weight as they think it is entitled to: *Lawyer v. Smith*, 8 Mich. 411, 77 Am. Dec. 460. A want of recollection on the part of a witness to a will is not fatal to it if it is properly attested and signed and other evidence is introduced showing that at the time the testator called the paper his will and requested the witnesses to sign it as witnesses: *Dewey v. Dewey*, 1 Met. 349, 35 Am. Dec. 367. Where subscribing witnesses to a will are unable to identify with certainty the paper in contest as the same subscribed by them, other competent evidence is admissible to establish that fact: *Montgomery v. Perkins*, 2 Met. (Ky.) 448, 74 Am. Dec. 419. If the attestation clause recites all the facts necessary to constitute a due execution and publication of the will, which is signed by two witnesses, and the will appears to have been duly executed, but the witnesses, after a lapse of several years, fail to recollect affirmatively the facts attested by them over their own signatures, this does not justify a finding that the statutory requirements were not observed: *Brown v. Clark*, 77 N. Y. 369, 372. After proof of the testator's signature and that of the witnesses to a will, the law presumes the existence of everything else necessary to give the instrument validity, whether the attestation clause states that the requisites of the law were observed or not, and this presumption is not rebutted by forgetfulness on the part of the subscribing witnesses: *Vernon v. Kirk*, 30 Pa. St. 218; *Estate of Tyler*, 121 Cal. 405; *Brown v. Clark*, 77 N. Y. 369, 372; *Allaire v. Allaire*, 37 N. J. L. 312. If the attestation clause and the surrounding circumstances satisfactorily establish the execution of a will, its probate cannot be defeated by a failure of recollection on the part of the subscribing witnesses: *Rugg v. Rugg*, 83 N. Y. 592; *In re Will of Kellum*, 52 N. Y. 517; *Peck v. Cary*, 27 N. Y. 9, 84 Am. Dec. 220; *Allaire v. Allaire*, 37 N. J. L. 312. A want of memory will no more destroy the attestation of a will than insanity or death: *Kirk v. Carr*, 54 Pa. St. 285. In proportion to the absence of memory of witnesses, care and vigilance should be exercised in examining facts to prevent fraud and imposition, but if the circumstances satisfy the judgment that the statute has been complied with, there is no rule of law preventing the admission of the will to probate: *In re Will of Kellum*, 52 N. Y. 517, 519. The court,

where the recollection of subscribing witnesses is infirm, will not require positive affirmative evidence respecting all the requisite formalities, but will draw its conclusions from all the circumstances disclosed by the evidence: *Jauncey v. Thorne*, 2 Barb. Ch. 40, 45 Am. Dec. 424.

A will may, upon competent evidence, be established upon the testimony of one of the subscribing witnesses in opposition to that of the other subscribing witness or witnesses: *Trustees v. Calhoun*, 25 N. Y. 422; *Higgins v. Carlton*, 28 Md. 115, 92 Am. Dec. 686; *In re Stillman's Estate*, 9 N. Y. Supp. 446; or it may be proved, upon competent evidence, by other than the subscribing witnesses, where one or more of them deny their signatures, or that the testator was of sound mind, or that the will was properly executed. In other words, a will may be established in the face of, or in opposition to, the testimony of the attesting witnesses: *Gillis v. Gillis*, 96 Ga. 1, 51 Am. St. Rep. 121; *Jauncey v. Thorne*, 2 Barb. Ch. 40, 45 Am. Dec. 424; *Pearson v. Wightman*, 1 Mill. 336, 12 Am. Dec. 636; *Rugg v. Rugg*, 21 Hun. 383; 83 N. Y. 592; *Reeve v. Crosby*, 8 Redf. 74; *Trustees v. Calhoun*, 25 N. Y. 422; *Fuller v. Fuller*, 83 Ky. 345, 350; *Peebles v. Case*, 2 Bradf. 226; *Howard's Will*, 5 T. B. Mon. 199, 17 Am. Dec. 60; *Hight v. Wilson*, 1 Dall. 94; *Will of Jenkins*, 43 Wis. 610; *Norton v. Norton*, 2 Redf. 6, 13; *Cheatham v. Hatcher*, 30 Gratt. 56, 32 Am. Rep. 650.

Thus, the witnesses to a will are not the only persons competent to prove its due execution or the testator's sanity; but these facts may be proved by other witnesses: *Morton v. Heldorn*, 135 Mo. 608. If, at the time of the probate of a will, a subscribing witness is incompetent, from any cause, or unwilling to testify to its attestation by himself or the other subscribing witnesses, or to the due execution of the will by the testator while mentally capable, or if he denies any of these facts, they may be proved by competent witnesses having knowledge thereof, although not subscribing witnesses to the will: *Gillis v. Gillis*, 96 Ga. 1, 51 Am. St. Rep. 121. A will need not be proved by two subscribing witnesses, but may be admitted to probate upon extrinsic evidence, even where one of them denies the due execution: *Cheatham v. Hatcher*, 30 Gratt. 56, 32 Am. Rep. 650. The fact that a testator knew an instrument to be his will may be established against the testimony of all the subscribing witnesses: *Trustees v. Calhoun*, 25 N. Y. 422. A will may be supported against the testimony of some, or even of all, of the subscribing witnesses thereto, if their testimony is overborne by other evidence: *Will of Jenkins*, 43 Wis. 610, 612. An attestation, coupled with other circumstances, may authorize a finding, against the evidence of the other subscribing witness, that the will was duly executed; but would not, it seems, without regard to any extrinsic fact, support such a finding against the positive testimony of a living witness: *Orser v. Orser*, 24 N. Y. 51. If the attestation clause is full and complete, and

recites the facts necessary to a due publication of the will, a due publication may be found, though but one subscribing witness testifies to the essential facts, and they are denied by the other: *Matter of Berusee*, 141 N. Y. 389, 393. Where there is affirmative proof that the testator declared the instrument to be his will to each of the subscribing witnesses, the will may be established if such proof be sufficient to overcome either the want of recollection on the part of the subscribing witnesses that such declaration was made, or their positive denial that it was made: *Note to Peck v. Carey*, 84 Am. Dec. 241.

The various subscribing witnesses to a will need not agree in their evidence, nor in being able to recollect all the material facts, nor need the evidence of all, or of any of them, support the will. As said above, it may be admitted to probate, even in opposition to their testimony. All that is requisite is, that from all the competent evidence adduced the court should be satisfied of the sanity of the testator and the due execution of the will: *Jauncey v. Thorne*, 2 Barb. Ch. 40, 45 Am. Dec. 424. A will may be sustained, even in opposition to the positive testimony of one or more of the subscribing witnesses, who, either mistakenly or corruptly, swear that the formalities required by the statute were not complied with, if, from other testimony in the case, the court or jury is satisfied that the contrary was the fact: *Jauncey v. Thorne*, 2 Barb. Ch. 40, 59, 45 Am. Dec. 424, 433; *Fuller v. Fuller*, 83 Ky. 345, 350; *Peebles v. Case*, 2 Bradf. 226. The probate of a will does not depend upon the good faith: *Jesse v. Parker*, 6 Gratt. 57, 64, 62 Am. Dec. 102, 105; or the veracity of a subscribing witness: *Abbott v. Abbott*, 41 Mich. 540. Evidence contradicting that of the attesting witnesses to a will may also be received to invalidate the instrument: *Spencer v. Moore*, 4 Call, 423.

There is, however, neither principle nor statutory provision that necessarily makes a person a witness to a will merely because he subscribed his name in the place where such witnesses usually subscribe their names; nor that prevents the person whose name is so subscribed, or any person interested, from explaining how and why the subscription came to be made, and that in fact the person so subscribing was not a witness, as he purported to be by the writing. Hence, a person purporting by the will itself to be a subscribing witness thereto, but not present when it was proved, may afterward show, before a court having jurisdiction, in a proper case, that he was not such witness, and though the burden of proof is on him to show this, still, when he proves it, he is entitled to any benefits conferred upon him by the will, and which must be withheld were he a witness thereto: *Boone v. Lewis*, 103 N. C. 40, 14 Am. St. Rep. 783.

The opinion of the subscribing witnesses to a will respecting the sanity of the testator at the time of the execution of the instrument is, it is held, admissible in evidence, without any statement

of the facts or circumstances upon which it is founded: *Kaufman v. Caughman*, 49 S. C. 159, 61 Am. St. Rep. 808; *Williams v. Lee*, 47 Md. 321; *Potts v. House*, 6 Ga. 324, 50 Am. Dec. 329; *Titlow v. Titlow*, 54 Pa. St. 216, 93 Am. Dec. 691; *Logan v. McGinnis*, 12 Pa. St. 27; *Vah Huss v. Rainbolt*, 2 Cold. 139; *Robinson v. Adams*, 62 Me. 369, 16 Am. Rep. 473; *Oall v. Byram*, 39 Ind. 499; *Walker v. Walker*, 34 Ala. 469; but the testimony of the subscribing witness to a will is not conclusive as to the sanity or insanity of the testator: *Howard's Will*, 5 T. B. Mon. 199, 17 Am. Dec. 60; *Chappell v. Trent*, 90 Va. 849; and it has been held that the attestation of a will is no evidence that the witness believed the testator to be sane: *Baxter v. Abbott*, 7 Gray, 71; and that, therefore, the testimony of the subscribing witnesses, on the probate of the will, denying mental capacity is not contradictory: *In re D'Avignon's Will*, 12 Colo. App. 489; but see, *infra*, as to the effect of denials by a subscribing witness. Such witness cannot testify as to the testator's condition of mind, in part from what he learned at the time of attestation and in part from what he has since learned: *Williams v. Spencer*, 150 Mass. 346, 15 Am. St. Rep. 206; and his opinion, at the time of the making of a codicil, is not admissible to show the condition of the testator's mind when the will itself was made: *Melanefy v. Morrison*, 152 Mass. 473.

Attesting witnesses to a will are not incompetent to deny the testator's testamentary capacity or proper execution of the will, but when they do so they stultify themselves, and their testimony is looked upon with suspicion: *Webb v. Dye*, 18 W. Va. 376; *Young v. Barner*, 27 Gratt. 96; *Lamberts v. Cooper*, 29 Gratt. 61; *Cheatham v. Hatcher*, 30 Gratt. 56, 32 Am. Rep. 650; *In re Jacott's Will*, 6 N. Y. Supp. 122; *Gwin v. Gwin* (Idaho), 48 Pac. Rep. 295. In early times, when wills were executed with so much solemnity, a witness who attested the execution of a will and then testified to the incompetency of the testator was regarded much in the light of a perjured person, for his attestation was considered a certificate that the testator was of sound mind. The custom and usage, however, of executing wills in the most informal manner has greatly modified this view: *Note to Scribner v. Crane*, 21 Am. Dec. 84. It is sometimes said that the testimony of an attesting witness to a will is entitled to "peculiar" weight: *Kerr v. Lunsford*, 31 W. Va. 659; but this special value given to the testimony of a subscribing witness arises from his acknowledged opportunity of observation at the precise time in question, and from the probability of his using the opportunity on account of his participation in the transaction. Hence, if it clearly appears from his own testimony that he did not use the opportunity, this special value of his opinion ceases. It is because of this opportunity, and not because he wrote his name on the instrument, that the testimony of an attesting witness is usually listened to with attention. It is not entitled to more weight than testimony from other witnesses of equal credit, better

opportunity, and more judgment and knowledge upon the subject. It should not be invested by law with any fictitious official weight, so as to pass for more than it is worth. The weight and value of his testimony must be determined, like that of other witnesses, with reference to his opportunity for observation, his skill and care in observing, and his intelligence and powers of discernment and memory: *Thornton v. Thornton*, 89 Vt. 122, 158, per Steele, J. His testimony is not to be preferred: *Newhard v. Yundt*, 132 Pa. St. 324; but it should be weighed and considered the same as that of any other witness: *Burney v. Torrey*, 100 Ala. 157, 46 Am. St. Rep. 83. The evidence of the attesting witnesses to a will as to mental capacity or undue influence is not entitled to special consideration or prominence merely because they are attesting witnesses. On the contrary, the value of their evidence is exactly the same as that of any other witnesses of equal intelligence, with equal means of knowledge and observation, and equally credible: *Crandall's Appeal*, 63 Conn. 365, 38 Am. St. Rep. 375; *Burney v. Torrey*, 100 Ala. 157, 46 Am. St. Rep. 33; *Webb v. Dye*, 18 W. Va. 376, 380.

The question of the due execution of a will is to be determined like any other in view of all the legitimate evidence in the case; and no controlling effect is to be given to the testimony of the subscribing witnesses: *Webb v. Dye*, 18 W. Va. 376, 380. In issues before a jury the credibility of witnesses is a question for them to pass upon: *Diehl v. Rodgers*, 169 Pa. St. 313, 47 Am. St. Rep. 908; *McFadin v. Catron*, 120 Mo. 252. The interest of a subscribing witness to a will does not disqualify him, but goes to his credit only: *Jones v. Habersham*, 63 Ga. 146; though if he is to profit by the will his testimony may be unreliable: *Rollwagen v. Rollwagen*, 5 Thomp. & C. 402; 3 Hun, 121. Contradictory statements by subscribing witnesses do not invalidate a will: *Otterson v. Hofford*, 86 N. J. L. 129, 18 Am. Rep. 429; and their inability to testify to the mental capacity of the testator does not render the will void, but only goes to their credibility: *Huff v. Huff*, 41 Ga. 696. A mere mistake as to a collateral fact does not destroy a witness' credibility: *Coddington v. Jenner*, 57 N. J. Eq. 528, 532; nor does the fact that he testifies positively as to certain matters destroy his credibility where he, before the trial, was suddenly interviewed concerning them, but was then uncertain and without a clear recollection as to his act in witnessing the signature to a will: *Stewart v. Stewart*, 56 N. J. Eq. 761. In Pennsylvania, where proof of the execution of a will must be made by two witnesses, each one must separately depose as to all facts necessary to complete the chain of evidence, so that no link of it may depend on the credibility of but one witness: *Simrell's Estate*, 154 Pa. St. 604, 35 Am. St. Rep. 864. In a late English case the probate of a will, which had been originally granted on the evidence of the two attesting witnesses, was confirmed, although one of the wit-

witnesses was not called and the other, retracting his evidence on the probate, swore in effect that the signatures of the testator and witnesses were forged. The later evidence of this witness was regarded as incredible, and the absence of the other was satisfactorily explained: *Pilkington v. Gray*, [1890] App. Cas. 401. The proponent of a will must produce an attesting witness, if within his reach; and he cannot omit this, though he may know that the witness, when produced, will depose falsely. But he is not concluded by the testimony of the witness, and he may contradict his statements and show the real facts in regard to the execution and attestation of the will by other evidence. He is compelled, by the rules of law, to put this witness upon the stand, and has no option in the matter, but he does not, in so offering him to the court, declare that he is worthy of credit. He may show by other evidence that the statements of the witness are false, and that the will was, in fact, well executed and attested. He does not so indorse his testimony, or hold him as worthy of credit, as to estop him from proving that his previous statements contradict his present testimony: *Alexander v. Beadle*, 7 Cold. 128, 128. If, upon examining all of the witnesses and considering the attending circumstances, a reasonable doubt exists, when a will is offered for probate, whether one or more of the directions of the statutes have not been omitted, the probate must be refused, although it may appear probable that it expresses the testator's intentions: *Trustees v. Calhoun*, 25 N. Y. 429, note.

Devisavit vel non.—Upon an issue *devisavit vel non*, a certificate of attestation signed by the subscribing witnesses, showing that all the statutory requirements for the valid execution of the will have been complied with, is proper to go to the jury, with the other evidence, to be considered by them upon the question of the due execution of the will, especially where eighteen years have elapsed since the execution thereof: *Webb v. Dye*, 18 W. Va. 376, 388. But such an issue will not be awarded where the testimony of the subscribing witnesses is clear, positive, and satisfactory, particularly if they are reputable members of the bar, and the testimony questioning the validity of the will is not reliable: *Douglass' Estate*, 162 Pa. St. 567; *Rice's Estate*, 173 Pa. St. 298; *Coleman's Estate*, 185 Pa. St. 437. It will not be awarded where, after the probate of a will, a subscribing witness repudiates his testimony upon an appeal, if his original testimony is corroborated by that of a member of the bar whose integrity is beyond question, and particularly where the later statement of the subscribing witness is inconsistent with the testimony of another witness: *Rice's Estate*, 173 Pa. St. 298.

AETNA LIFE INSURANCE COMPANY v. SELLERS.

[154 Indiana, 370.]

PLEADING — DEMURRER — WAIVER OF DEFECT.—A CROSS-COMPLAINT, in which the cross-complainant's want of capacity to maintain his suit affirmatively appears, is defective, but such defect is waived by a demurrer which assigns only a want of facts.

INSANE PERSONS — CONTRACTS OF—VALIDITY.—The executed contract of an insane person who was not under guardianship at the time of its execution is voidable only, and not void.

RELEASE BY INSANE PERSON—DISAFFIRMANCE AS CONDITION PRECEDENT TO RIGHT OF ACTION.—If a cross-complainant, an insane person not under guardianship, asks the foreclosure of a mortgage, which is affirmatively shown by his pleading to have been released by him, but no disaffirmance is pleaded, though grounds therefor are disclosed, the release must stand as a voidable executed contract, not a void one. Hence, the cross-complaint discloses no right of action.

F. C. Dailey, A. Simmons, J. S. Dailey, and H. C. Pettit, for the appellant.

A. N. Martin and W. H. Eichhorn, for the appellees.

³⁷⁰ **BAKER, J.** Appellant began this suit to foreclose a mortgage executed to it in June, 1889, by Kerlin B. Sellers on lands in Wells county. Appellee Richard P. Sellers filed a cross-complaint in two paragraphs to foreclose a mortgage on the same land executed by Kerlin B. Sellers in March, 1860. Appellant's demurrer to the cross-complaint was overruled. Answer of general denial, of payment, and of release of appellee's mortgage. Reply of general denial of payment and release, and of an argumentative denial of payment. Appellee Richard P. Sellers did not answer appellant's complaint. There were various pleadings by other parties, but no question arises respecting them. Special finding of facts and conclusions of law. Decree, foreclosing appellee's mortgage. Appellant's motion for a new trial overruled. The errors assigned involve the cross-complaint of Richard P. Sellers, the conclusions of law, and the motion for a new trial.

³⁷¹ The first paragraph of cross-complaint alleges that Kerlin B. Sellers, on March 8, 1860, executed his six months note for seventeen hundred and ninety dollars to Benjamin Klahr and Benjamin Kline, executors of the last will of Philip Kline, deceased, and secured it by the mortgage of himself and wife

upon the land in question; that the mortgage was duly recorded, etc.; that copies of the note and mortgage are attached, etc.; that on January 31, 1876, the payees of the note duly indorsed and delivered it to cross-complainant; that on August 1, 1889, a proper assignment of the mortgage was executed to cross-complainant and duly recorded on the same day; that on August 3, 1889, "the plaintiff and other persons procured this cross-complainant to execute a pretended release of his interest in said mortgage and mortgage debt, and caused the same to be entered of record in the office of the recorder of said county; that at the time of the execution by this cross-complainant of said pretended release and long prior thereto, the cross-complainant was and had been a person of unsound mind and utterly incapable of understanding the nature of such or of any instrument; that said pretended release was without consideration; that ever since the execution of such pretended release the cross-complainant has continued to be and now is a person of unsound mind; that at the time of the execution of said pretended release the plaintiff had notice and knowledge that this cross-complainant was then and there a person of unsound mind and has had such notice ever since"; that the debt remains due and unpaid, etc., and prays that the release be set aside and the mortgage foreclosed.

Cross-complainant's want of capacity to maintain his suit affirmatively appears; but as the demurrer assigned only the want of sufficient facts, the defect was waived: *Rev. Stats. 1881, and Horner's Rev. Stats. 1897, sec. 339; Burns' Rev. Stats. 1894, sec. 342; Wade v. State, 37 Ind. 180; Edwards v. Beall, 75 Ind. 401.*

It is thoroughly settled in this state that the executed contract of an insane person who is not under guardianship ³⁷² at the time is voidable only, and not void: *Crouse v. Holman, 19 Ind. 30; Somers v. Pumphrey, 24 Ind. 231; Musselman v. Cravens, 47 Ind. 1; Nichol v. Thomas, 53 Ind. 42; Freed v. Brown, 55 Ind. 310; Wray v. Chandler, 64 Ind. 146; Hardenbrook v. Sherwood, 72 Ind. 403; McClain v. Davis, 77 Ind. 419; Schuff v. Ransom, 79 Ind. 458; Fay v. Burditt, 81 Ind. 433, 42 Am. Rep. 142; Copenrath v. Kienby, 83 Ind. 18; Northwestern Ins. Co. v. Blankenship, 94 Ind. 535, 48 Am. Rep. 185; Physio-Medical College v. Wilkinson, 108 Ind. 314; Boyer v. Berryman, 123 Ind. 451; Ashmead v. Reynolds, 127 Ind. 441; Louisville etc. Ry. Co. v. Herr, 135 Ind. 591; Thrash v. Starbuck, 145 Ind. 673.*

Until disaffirmed, the voidable executed contract in respect to the property or benefits conveyed passes the right or title as fully as an unimpeachable contract. By ratification, it becomes impervious; by disaffirmance, a nullity. And as such a contract may be ratified, whether the beneficiary was ignorant of the grantor's infirmity or obtained the benefit by means of his knowledge of the disability, so, in either case, disaffirmance is necessary in order to reduce the contract to nothingness: *Schuff v. Ransom*, 79 Ind. 458; *Fay v. Burditt*, 81 Ind. 433, 42 Am. Rep. 142; *Ashmead v. Reynolds*, 127 Ind. 441; *Louisville etc. Ry. Co. v. Herr*, 135 Ind. 591.

In this suit the cross-complainant, an insane person not under guardianship, asked the foreclosure of a mortgage which the first paragraph of his pleading affirmatively showed had been released by him. The pleading discloses grounds on which the release might be disaffirmed. But no disaffirmance is pleaded. Until disaffirmed the release stood as a voidable executed contract—not a void one; and this paragraph of cross-complaint, therefore, disclosed no right of action: *Nichol v. Thomas*, 53 Ind. 42; *Schuff v. Ransom*, 79 Ind. 458; *Fay v. Burditt*, 81 Ind. 433, 42 Am. Rep. 142; *Physio-Medical College v. Wilkinson*, 108 Ind. 314; *Ashmead v. Reynolds*, 127 Ind. 441; *Louisville etc. Ry. Co. v. Herr*, 135 Ind. 591; *Thrash v. Starbuck*, 145 Ind. 673. The same rule, ³⁷³ of course, applies to contracts voidable on account of infancy or other disability: *Law v. Long*, 41 Ind. 586; *Scranton v. Stewart*, 52 Ind. 68; *Long v. Williams*, 74 Ind. 115. The defect in failing to aver disaffirmance goes to the substances of the case, for disaffirmance is a condition precedent to the right of action. The principle involved is similar to that in a case for the recovery of an estate on account of the breach of a condition subsequent in a deed, wherein the complaint must show not only the breach, but also a forfeiture on account of the breach, effected by re-entry or demand, prior to the filing of the complaint: *Preston v. Bosworth*, 153 Ind. 458, 74 Am. St. Rep. 313. The only cases in this state that might be considered out of line with the numerous authorities above cited are *Hull v. Louth*, 109 Ind. 315, 58 Am. Rep. 405, and *Lange v. Dammier*, 119 Ind. 567; and they were distinguished in *Ashmead v. Reynolds*, 127 Ind. 441.

In this paragraph not only is there a failure to allege disaffirmance, but there is a direct disclosure of the incapacity of

the cross-complainant to disaffirm: *Nichol v. Thomas*, 53 Ind. 42; *Louisville etc. Ry. Co. v. Herr*, 135 Ind. 591.

The second paragraph of the cross-complaint set forth the same facts as the first, except that it contained no reference to the release. The answer pleaded the release. The reply was a general denial. As appellant's demurrer was addressed to the cross-complaint as an entirety, there was no available error in overruling it, since the second paragraph was good. But under the issues formed on this paragraph, the errors that were embodied in the first paragraph were carried throughout the trial. In the special finding and in the evidence, no disaffirmance is shown, but a want of capacity to disaffirm is disclosed.

Judgment reversed, with directions to sustain appellant's motion for a new trial.

INSANE PERSONS—CONTRACTS OF—VALIDITY—DISAFFIRMANCE.—The contract of a lunatic made before an inquisition has declared him insane is not absolutely void, but merely voidable, and must, to be inoperative, be disaffirmed by him his guardian, or committee: See monographic note to *Flach v. Gottschalk Co.*, 71 Am. St. Rep. 425, on contracts of insane persons. That a contract by an insane person, whether executory or executed, is utterly void, even where there has been no judicial determination of the fact of insanity, see *American Trust etc. Co. v. Boone*, 102 Ga. 202, 66 Am. St. Rep. 167.

ADAMS v. SHELBYVILLE

[154 Indiana, 467.]

MUNICIPAL CORPORATIONS—ASSESSMENTS FOR LOCAL IMPROVEMENTS—ACCRUING BENEFITS.—The imposition of assessments for local improvements per front foot, irrespective of the question of accruing benefits, is in violation of the fourteenth amendment to the federal constitution.

MUNICIPAL CORPORATIONS—ASSESSMENTS FOR LOCAL IMPROVEMENTS—TAXING DISTRICT.—The legislature may create, or authorize a municipality to create, a local taxing district for local improvement purposes, which includes part only of the property within the municipality.

MUNICIPAL CORPORATIONS—ASSESSMENTS FOR LOCAL IMPROVEMENTS WITHIN TAXING DISTRICT.—The legislature may declare, conclusively, that only the property within a taxing district, created for local improvement purposes, shall be specially assessed on account of local improvements within that district.

MUNICIPAL CORPORATIONS—ASSESSMENTS FOR LOCAL IMPROVEMENTS—TAXING DISTRICT—SPECIAL BENEFITS.—EACH PARCEL of contributing property in a taxing district for local improvements therein may be assessed only to the extent that it actually receives special benefits.

MUNICIPAL CORPORATIONS—ASSESSMENTS FOR LOCAL IMPROVEMENTS—WHOLE TAXING DISTRICT—SPECIAL BENEFITS.—A taxing district for local improvements may, as a whole, be assessed only to the extent of the sum of the special benefits actually received by the several parcels of contributing property.

MUNICIPAL CORPORATIONS—ASSESSMENTS FOR LOCAL IMPROVEMENTS—EXCESS OF COSTS OVER SPECIAL BENEFITS.—A local improvement in a taxing district, so far as its cost exceeds the special benefits resulting to the several parcels of property therein, is a benefit to the municipality at large, and such excess must be borne by the general treasury.

MUNICIPAL CORPORATIONS—ASSESSMENTS FOR LOCAL IMPROVEMENTS—HEARING AS TO SPECIAL BENEFITS.—Property owners, affected by a local improvement within a taxing district, are entitled to a hearing on the question of special benefits.

MUNICIPAL CORPORATIONS—ASSESSMENTS FOR LOCAL IMPROVEMENTS—DUTY OF COMMON COUNCIL.—As special benefits are the only foundation for special assessments, the common council of a municipality not only have the power, but it is their imperative duty, under the laws of Indiana, in reviewing and altering assessments for street improvements, to adjust them to conform to the actual special benefits accruing to each of the abutting property owners.

MUNICIPAL CORPORATIONS—ASSESSMENTS FOR LOCAL IMPROVEMENTS.—A DEFICIT IN SPECIAL BENEFITS, to meet the cost of a street improvement, must, under the statutes of Indiana, be provided for from the general revenues of the municipality.

MUNICIPAL CORPORATIONS—ASSESSMENTS FOR LOCAL IMPROVEMENTS—VALIDITY OF STATUTE.—The statute of Indiana concerning assessments for local improvements, commonly known as the "Barrett law," is not obnoxious to any provision of the state or federal constitution.

MUNICIPAL CORPORATIONS—ASSESSMENTS FOR LOCAL IMPROVEMENTS—ORNAMENTAL WORK.—A city, without express authority, has no power to construct lawns or other decorations in the streets, and to enforce the cost thereof against abutting property owners. Hence, a resolution passed by a city council for a street improvement, which requires the space between the sidewalk and curb to be filled at the expense of abutters with "rich dirt and sodding," is ultra vires and void.

INJUNCTION AGAINST STREET IMPROVEMENT.—Equity will enjoin the exercise of an unauthorized power. Hence, an abutting property owner is entitled to an injunction against so much of a proposed street improvement as is unauthorized by law.

T. B. Adams, Isaac Carter, B. F. Love, and H. C. Morrison,
for the appellant.

D. L. Wilson, W. A. Yarling, A. E. Lisher, J. Chez, B. K. Elliott, F. L. Littleton, Nelson & Myers, and McConnell & Jenkins, for the appellee.

⁴⁰⁸ HADLEY, C. J. Appellant brought this suit to restrain appellee from improving a street on which he owned an abutting lot.

Shelbyville has less than ten thousand inhabitants, and the proceedings for the proposed improvement were instituted under the statute commonly known as the "Barrett law": Burns' Rev. Stats. 1894, secs. 4288-4298; Rev. Stats. 1881, and Horner's Rev. Stats. 1897, secs. 6771-6780. On August 2, 1898, the common council, without any petition from the owners of the property affected, passed a resolution declaring a necessity for the improvement, the same to be executed as follows: "There shall be set and erected a curb of oolitic stone four inches thick, twenty inches wide, and not less than five feet in length, to be set twenty-two feet from the lot line outward, set to grade, set on a good bed of sand four inches thick, and to be dressed so that when set and completed the part of curbing that is exposed will show as dressed; the joints all to fit neat and smooth and make close connection; and the space between the brick sidewalk on said part of said street shall be filled with good, rich dirt, and properly graded and made smooth, and when grade is made, to be covered with good ⁴⁰⁹ live, fresh sod, to be on grade with the curbing and the brick sidewalk, . . . and that the cost and expense thereof, including advertising, labor, and material for the same, be assessed against the property on the line, and collected according to the provisions of an act of the general assembly of the state of Indiana approved March 8, 1889, and amendments thereto," and that notice should be given by publication that the common council, on August 30, 1898, at their chamber, would receive sealed proposals for the execution of the work, and would hear property owners' objections to the necessity for the construction thereof.

On August 26, 1898, appellant filed his complaint stating the foregoing facts, and alleging that the street to be improved is one hundred feet wide, and the proposed widening of the sidewalks to twenty-two feet on each side will reduce the roadway to about fifty-five feet; that the making of said improvement will cost about one dollar per lineal foot, which it is proposed the abutting property owners shall pay; that it will inconvenience the plaintiff and other property owners, and make

their property less valuable because of the inconvenience in getting to and from the traveled roadway; that it will be of no benefit to the plaintiff, and damage him one hundred dollars. The sustaining of a demurrer to the complaint for want of facts is the only error assigned.

Counsel, in the introduction of their respective briefs, epigrammatically state the principal issue in this court thus: "Is the 'Barrett law' law?" "The 'Barrett law' is law." "The 'Barrett law' is not law."

We will not stop now to inquire whether the demurrer to the complaint should have been overruled for a minor cause, since the appellant, as indicated by his argument, has based his appeal principally upon the question of the statute's constitutionality; and for the present the complaint will be taken as admitting that the city intends to proceed in accordance with the provisions of the statute. Appellant's contention is that the statute, in violation of the federal and ⁴⁷⁰ state constitutions, provides for the taking of property without just compensation and without due process of law. Two propositions are involved: 1. Is the method of assessing the whole cost of a street improvement upon the abutting property equally by the frontage, irrespective of accruing benefits and damages, constitutional? 2. Is that the method required by the Barrett law?

Many of the courts of this country have answered the first question in the affirmative. Cooley on Taxation, second edition of 1886, page 644, says: "In many instances where streets were to be opened or improved, sewers constructed, water pipes laid, or other improvements entered upon, the benefits of which might be expected to diffuse themselves along the line of the improvement in a degree bearing some proportion to the frontage, the legislature has deemed it right and proper to take the line of frontage as the most practicable and reasonable measure of probable benefits, and, making that the standard, to apportion the benefits accordingly. Such a measure of apportionment seems at first blush to be perfectly arbitrary, and likely to operate in some cases with great injustice; but it cannot be denied that in the case of some improvements, frontage is a very reasonable measure of benefits, much more just than value could be, and, perhaps, approaching equality as nearly as any estimate of benefits made by the judgment of men. However this may be, the authorities are well united in the conclusion

that frontage may lawfully be made the basis of apportionment."

In his treatise on Municipal Corporations, published in 1890, Dillon gives an extended review of the subject, and notes that the courts are very generally agreed that the authority to require property specially benefited to bear the expense of local improvements is embraced within the taxing power, and that a statute authorizing municipal authorities to make such improvements and assess the cost in proportion to the frontage, in the absence of some special constitutional restriction, is a valid exercise of the power of taxation, and ⁴⁷¹ according to the weight of authority is considered to be a question of legislative expediency: Dillon on Municipal Corporations, 4th ed., secs. 752-761. And, as upholding the doctrine of the majority, the author notes (section 760) that the supreme court of the United States holds that state laws imposing upon property, according to legislative discretion, the cost of local improvements, do not deprive the owner of his property without due process of law within the meaning of the fourteenth amendment: Davidson v. New Orleans (1877), 96 U. S. 97, 104; County of Mobile v. Kimball (1880), 102 U. S. 691; Hagar v. Reclamation Dist. (1883), 111 U. S. 701; Wurts v. Hoagland (1884), 114 U. S. 606; Walston v. Nevin (1888), 128 U. S. 578. To which may be added Spencer v. Merchant (1887), 125 U. S. 345; Williams v. Eggleston (1898), 170 U. S. 304, 311; Parsons v. District of Columbia (1898), 170 U. S. 45.

The author, however, after considering many cases pro and con, and summing up the general principles underlying special assessment, in his eighth conclusion (section 761), affirms what he conceives to be the only true rule upon principle as follows: "Whether it is competent for the legislature to declare that no part of the expense of a local improvement of a public nature shall be borne by a general tax, and that the whole of it shall be assessed upon the abutting property and other property in the vicinity of the improvement, thus for itself conclusively determining, not only that such property is specially benefited, but that it is thus benefited to the extent of the cost of the improvement, and then to provide for the apportionment of the amount by an estimate to be made by designated boards or officers, or by frontage or superficial area, is a question upon which the courts are not agreed. Almost all of the earlier cases asserted that the ⁴⁷² legislative discretion in the apportionment of public burdens extended this far, and

such legislation is still upheld in most of the states. But since the period when express provisions have been made in many of the state constitutions, requiring uniformity and equality of taxation, several courts of great respectability, either by force of this requirement or in the spirit of it, and perceiving that special benefits actually received by each parcel of contributing property was the only principle upon which such assessments can justly rest, and that any other rule is unequal, oppressive, and arbitrary, have denied the unlimited scope of legislative discretion and power, and asserted what must, upon principle, be regarded as the just and reasonable doctrine, that the cost of a local improvement can be assessed upon particular property only to the extent that it is specially and peculiarly benefited; and since the excess beyond that is a benefit to the municipality at large, it must be borne by the general treasury."

Among the many cases cited by the author in support of his conclusion is *Tide-water Co. v. Coster*, 18 N. J. Eq. 518, 527, 90 Am. Dec. 634, where it is said: "Where lands are improved by legislative action, on the ground of public utility, the cost of such improvement, it has been frequently held, may, to a certain degree, be imposed on the parties who, in consequence of owning lands in the vicinity of such improvement, receive a peculiar advantage. By the operation of such a system, it is not considered that the property of the individual, or any part of it, is taken from him for the public use; because he is compensated in the enhanced value of such property. But it is clear this principle is only applicable when the benefit is commensurate to the burden—when that which is received by the land owner is equal or superior in value to the sum exacted; for if the sum exacted be in excess, then to that extent, most incontestably, private property is assumed by the public. Nor, as to this excess, can it be successfully maintained that such imposition is legitimate as an exercise of the power of taxation. Such ⁴⁷³ an imposition has none of the essential characteristics of a tax. We are to bear in mind that this projected improvement is to be regarded as one in which the public has an interest; the owners of these waste lands have a special concern in such improvement, so far as their lands will be in a peculiar manner benefited; beyond this, their situation is the same as that of the rest of the community. The consideration for the excess of the cost of the improvement over the enhancement of the property, within the operation of this act, is the public benefit; how, then, upon any principle of taxation, can this por-

tion of the expense be thrown exclusively upon certain individuals? The expenditure of this portion of the cost of the work can only be justified on the ground of benefit to the public. I am aware of no principle which will permit the expenses incurred in conferring such benefit upon the public, to be laid in the form of a tax upon certain persons, who are designated, not indeed by name, but by their description as the owners of certain lands."

In the recent case of *Norwood v. Baker*, 172 U. S. 269, filed December 12, 1898, the supreme court of the United States seems to have abandoned its former rulings and to have adopted what Dillon announces as the only true rule upon principle. In that case the court said: "The particular question presented for consideration involves the validity of an ordinance of that village [Norwood] assessing upon the appellee's land abutting on each side of the new street an amount covering not simply a sum equal to that paid for the land taken for the street, but, in addition, the costs and expenses connected with the condemnation proceedings"; and "the present appeal was prosecuted directly to this court, because the case involved the construction and application of the constitution of the United States."

Under a statute of Ohio the council was authorized to assess the cost and expenses of street improvement "by the ⁴⁷⁴ front foot of the property bounding and abutting upon the improvement. Under this statute the village passed an ordinance providing that all costs and expenses of the condemnation and opening proceedings should be assessed 'per front foot upon the property bounding and abutting on that part of Ivenhoe avenue as condemned and appropriated herein.'"

The real question presented by the facts is thus stated by the court: "Does the exclusion of benefits from the estimate of compensation to be made for the property actually taken for public use authorize the public to charge upon the abutting property the sum paid for it, together with the entire costs incurred in the condemnation proceedings, irrespective of the question whether the property was benefited by the opening of the street?"

In answering the question the court say: "The power of the legislature in these matters is not unlimited. There is a point beyond which the legislative department, even when exerting the power of taxation, may not go consistently with the citizen's right of property. As already indicated, the principle under-

lying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement. But the guaranties for the protection of private property would be seriously impaired, if it were established as a rule of constitutional law, that the imposition by the legislature upon particular private property of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvement, could not be questioned by him in the courts of the country. It is one thing for the legislature to prescribe it as a general rule that property abutting on a street opened by the public shall be deemed to have been specially benefited by such improvement, and therefore should specially contribute to the cost incurred by the public. It is quite a different thing to lay it down as an absolute rule that ⁴⁷⁸ such property, whether it is in fact benefited or not by the opening of the street, may be assessed by the front foot for a fixed sum representing the whole cost of the improvement, and without any right in the property owner to show, when an assessment of that kind is made or is about to be made, that the sum so fixed is in excess of the benefits received. In our judgment, the exaction from the owner of private property of the cost of a public improvement, in substantial excess of the special benefits accruing to him, is *to the extent of such excess*, a taking, under the guise of taxation, of private property for public use without compensation."

After reviewing many authorities and italicizing what Dillon affirms as the true rule, the court concludes: "It thus appears that the statute authorizes a special assessment upon the bounding and abutting property by the front foot for the entire cost and expense of the improvement, without taking special benefits into account. And that was the method pursued by the village of Norwood. The corporation manifestly proceeded upon the theory that the abutting property could be made to bear the whole cost of the improvement, whether such property was benefited or not to the extent of such cost."

And further: "As the pleadings show, the village proceeded upon the theory, justified by the words of the statute, that the entire cost incurred in opening the street, including the value of the property appropriated, could, when the assessment was by the front foot, be put upon the abutting property, irrespective of special benefits. The assessment was by the front foot and

for a specific sum representing such cost, and that sum could not have been reduced under the ordinance of the village even if proof had been made that the costs and expenses assessed upon the abutting property exceeded the special benefits. The assessment was in itself an illegal one, because it rested upon a basis that excluded any consideration of benefits. A decree enjoining the whole assessment was, therefore, the only appropriate one."

476 Again: "The present case is one of illegal assessment under a rule or system which, as we have stated, violated the constitution, in that the entire cost of the street improvement was imposed upon the abutting property by the front foot, without any reference to special benefits."

An assessment for such improvement, to be in conformity with the opinion, is thus stated: "That while abutting property may be specially assessed on account of the expense attending the opening of a public street in front of it, such assessment must be measured or limited by the special benefits accruing to it, that is, by benefits that are not shared by the general public; and that taxation of the abutting property for any substantial excess of such expense over special benefits will, to the extent of such excess, be a taking of private property for public use without compensation."

The final judgment of the court follows: "The judgment of the circuit court must be affirmed, upon the ground that the assessment against the plaintiff's abutting property was under a rule which excluded any inquiry as to special benefits, and the necessary operation of which was, to the extent of the excess of the cost of opening the street in question over any special benefits accruing to the abutting property therefrom, to take private property for public use without compensation."

While the facts in *Norwood v. Baker*, 172 U. S. 269, are unusual, and distinguishable from the facts in the case at bar, yet it cannot be successfully denied that the general doctrine laid down is to the effect that the imposition of assessments for local improvements per front foot, irrespective of the question of accruing benefits, is in violation of the fourteenth amendment to the federal constitution; and that the case has been so construed generally by the courts of the country: See *Loeb v. Columbia Tp.* (Jan. 9, 1899), 91 Fed. Rep. 37, involving the validity of assessments laid by a township upon abutting property for the improvement of a road; *Fay v. Springfield* 477 (May 9, 1899), 94 Fed. Rep. 409, street paving assessments against abut-

ters; *Sears v. Street Commrs.* (May 18, 1899), 173 Mass. 350, sewer assessments upon a particular class of property; *Hutcherson v. Storrie* (June 19, 1899), 92 Tex. 685, 71 Am. St. Rep. 884, street paving assessments upon abutting property; *Schroder v. Overman* (Oct. 24, 1899), 61 Ohio St. 1, street pavement and sewer assessments against abutters; *Charles v. Marion* (Dec. 11, 1899), 98 Fed. Rep. 166, street paving assessments against abutters.

The judgment of the federal supreme court defining the limits of legislative power, sanctioned by the federal constitution, is the supreme law of the land. It commands state courts as well as state legislatures. The duty thus imposed is agreeable as being in accord with our sense of just principles, and as furnishing the only reasonable foundation for the exercise of the taxing power in respect to special assessments.

Streets are public highways which all inhabitants of the municipality have an equal right to use and by the improvement of which all are in a measure benefited. There is much justice in holding that a sum equal to the special benefits, that is, such benefits as are not shared by the citizens generally, conferred upon the abutters may be exacted for application to the costs of the improvement; for when the corporation takes only so much as it returns in the way of enhanced values and increased personal comfort, the property owner is not injured; but when he has thus contributed his special benefits as to the remainder of the costs, he stands as any other citizen. This remainder represents the price to the public for its general benefits, and, when exacted from the abutters, is but the taxation of a class for public benefit, and clearly a taking of property for public use without just compensation.

We conclude, therefore, that the principles applicable to ⁴⁷⁹ assessments for local improvements are these: The legislature may create, or authorize a municipality to create, a local taxing district for local improvement purposes, which includes part only of the property within the municipality; the legislature may declare conclusively that only the property within the taxing district shall be specially assessed on account of local improvement within that district; each parcel of contributing property may be assessed only to the extent that it actually receives special benefits; the taxing district as a whole may be assessed only to the extent of the sum of the special benefits actually received by the several parcels of contributing prop-

erty; the improvement, so far as its cost exceeds the special benefits resulting to the several parcels of property in the taxing district, is a benefit to the municipality at large, and such excess must be borne by the general treasury; property owners affected by an improvement, within a taxing district, are entitled to a hearing on the question of special benefits.

It remains to be seen if the Barrett law denies any of these principles. Whether the answer shall be for the appellant or the appellee depends upon two considerations, namely: 1. Does the Barrett law require that the costs of street and alley improvements shall be assessed against abutting property by the front-foot rule, without regard to the question of resulting benefits? 2. Do the provisions of the Barrett law supply to affected property owners due process of law within the meaning of the state and federal constitutions?

In arriving at the true interpretation of the statute, it is useful for us to review the legislative and judicial history of the state and country prior to the enactment of the Barrett law in 1889.

Dillon and Cooley class Indiana as one of the majority states upholding the doctrine that it is competent for the legislature to conclusively declare that the total cost of a local improvement shall be assessed equally against the frontage; and such classification was not without warrant. In 1852, the right to confer authority upon municipal officers ⁴⁷⁹ so to provide for street and other improvements, was first asserted by the legislature as a general law: Rev. Stats. 1852, p. 217. It was reasserted in 1857 (Acts 1857, p. 53), and again in 1865 (Acts 1865, S. S., p. 29), and again in 1867 (Acts 1867, p. 66), and again approved in 1881: Rev. Stats. 1881, sec. 3163. The right to enforce such assessments was recognized by this court in 1861—*Indianapolis v. Imberry*, 17 Ind. 175—and in many subsequent decisions. The constitutionality of such legislation was never called in question until 1868, when it was assailed on the ground only that the same was in violation of the state constitution requiring the rate of assessment and taxation to be uniform and equal. Such legislation was then and subsequently upheld as against such objection: Const., art. 10, sec. 1; *Goodrich v. Winchester etc. Tp. Co.*, 26 Ind. 119; *Bright v. McCullough*, 27 Ind. 223; *Palmer v. Stumph*, 29 Ind. 329; *Law v. Madison etc. Tp. Co.*, 30 Ind. 77.

But the constitutional question of due process of law, and the taking of property for public use without compensation, in

the making of local improvements, within the meaning of the fourteenth amendment to the federal constitution, seems never to have been previously considered by this court, so far as we have observed. Hence no ground exists to justify the insistence that the determination by this court, under former street improvement laws, of the constitutional question now involved, has been carried into the enactment of the statute in controversy.

It should be noted that prior to 1889 no provision was found in any of the laws entitling property owners to a voice upon the necessity for the improvement, or to a hearing of any kind upon the acts of the assessing officers, or to be heard upon any subject touching the improvement, until after the issuance of a precept for the sale of their property for the payment of the assessment, and then only as to the regularity of the proceedings subsequent to the making of the contract for the improvement. As the law had stood for ⁴⁸⁰ thirty-seven years, when the Barrett law came up for consideration in the assembly of 1889, municipal officers had the power, with a two-thirds vote of the council, to order an improvement, however costly and however unnecessary and oppressive, without regard to the wishes of the citizens, and proceed to charge the abutters with the total cost by the frontage rule, irrespective of any consideration of benefits, and thus, in some instances, impose upon the citizen an absolute confiscation of property without any form of hearing in its defense, further than to require it to be done orderly, and according to prescribed rule. For some reasons the people had become dissatisfied with the law, as it existed, upon the subject. In what respects may be best judged from the character of the changes that were made. It is evident that the discontent did not arise from the method of frontage assessments, as a rule, for that principle had been consistently maintained in every enactment since 1852, and was carried into the Barrett law. Besides, in most cases the rule is as just and equitable as any that may be devised. In the light of thirty-seven years' experience, however, it was doubtless manifest to the lawmakers that in some instances municipal officers, by reckless and inconsiderate acts, without testing public opinion, had involved citizens in heavy and unnecessary burdens by improvements; and that it was to them equally clear that all property bordering upon a municipal highway was not affected in the same way by an improvement of the latter; that in some cases the grade may be so raised or lowered

as to most seriously impair the use and value of the property; in others, that some property may be situate upon a general level, highly improved, and in a business part of the city, while others upon the same street may be remote from business, lying low, and near a watercourse, and practically worthless for business or residential purposes; in others, some abutting lots may be twenty feet and others two hundred feet deep. It seems, therefore, reasonable to presume that the mischiefs resulting from the acts of ⁴⁸¹ reckless officials, and the common but exceptional cases of injustice and hardship flowing from the uniform and rigid application of the front-foot rule, were brought to the attention of the legislature, and that their avoidance was a purpose entering into the structure of the new law: *Quill v. Indianapolis*, 124 Ind. 292, 295. This much is certain, that, for reasons deemed sufficient, new and important provisions were incorporated into the new law—provisions contained in no previous law upon the subject.

The first of these is section 2, page 237, of the Acts of 1889 (*Burns' Rev. Stats. 1894, sec. 4289*), and is as follows: "Whenever cities or incorporated towns subject to the provisions of this act shall deem it necessary to construct any sewer, or make any of the alley or street improvements in this act mentioned, the council or board of trustees shall declare by resolution the necessity therefor, and shall state the kind, size, location, and designate the terminal points thereof, and notice for ten days of the passage of such resolution shall be given for two weeks in some newspaper of general circulation published in such city or incorporated town, if any there be, and if there be not such paper, then in some such paper printed and published in the county in which such city or incorporated town is located. Said notices shall state the time and place when and where the property owners along the line of said proposed improvement can make objections to the necessity for the construction thereof."

It is argued that this section affords the property owner no remedy beyond the right to advise the council with respect to the necessity for the improvement; and so it has been held by this court: *Quill v. Indianapolis*, 124 Ind. 292. But it does not follow that no benefit is to flow to the property owner from the observance of this provision. Municipal officers are elective, and, as a rule, in dealing with corporation affairs, will give respectful heed to the popular judgment of their constituents. This ⁴⁸² provision removes all power from the common council to impose burdens upon private property unawares the

owner. It requires public notice to be given of the character and location of the proposed improvement for twenty-four days from the first publication, a length of time sufficient to develop public opinion advisedly, and at a fixed time and place, and before making a contract, the council shall hear those along the line upon the subject of the improvement; and it may reasonably be expected that if the property owners shall be able to show that there exists no necessity for such improvement, or that it will cost more than the accruing benefits, well-meaning officers will be controlled by such showing and advice, as readily as by the positive mandate of a statute. It was not intended by this section to deprive the common council of the power of ordering the improvement irrespective of the advice of the property owners, but its purpose is to provide, in all cases, that they shall act advisedly and with deliberation.

The second and most important new provision is found in sections 6 and 7 of the Acts of 1889 (the latter section, as amended, Acts 1891, p. 324, Acts 1899, p. 63), sections 4293 and 4294 of Burns' Revised Statutes of 1894, which follow:

"Sec. 4293. When any such improvement has been made and completed according to the terms of the contract therefor made, the common council of such city, or the board of trustees of such town, shall cause a final estimate of the total cost thereof to be made by the city or town engineer, and the common council of such city, or the board of trustees of such town, shall require said city or town engineer to report to the common council of such city, or the board of trustees of such town, the following facts touching such improvement: 1. The total cost of said improvement; 2. The average cost per running front foot of the whole length of that part of the street or alley so improved; 3. The name of each property owner on that part of the street or alley so improved; 4. The number of front feet ⁴⁸³ owned by the respective property owners on that part of said street so improved; 5. The amount of such cost for improvement due upon each lot or parcel of ground bordering on said street or alley, which amount shall be ascertained and fixed by multiplying the average cost price per running front foot by the number of running front feet of the several lots or parcels of ground respectively; 6. The full description, together with the owner's name, of each lot or parcel of ground bordering on said street so improved; 7. In the case of the construction of a sewer, a description of each lot or parcel of lot benefited thereby, together with the owner's name and the fair

proportion of the cost of such sewer according to the benefits conferred thereby, that should be assessed against such lot or part of a lot.

"Upon the filing of the report provided for in the last preceding section, the common council of such city, or the board of trustees of such town, shall give two weeks' notice in a newspaper printed and published in such city or incorporated town, if any there be, and if there be no such paper, then in a newspaper printed and published in the county in which such city or incorporated town is located, of the time and place when and where a hearing can be had upon such report, before a committee to be appointed to consider such reports, and such committee shall make report to the common council of such city, or the board of trustees of such town, recommending the adoption or alteration of such report, and the common council of such city, or the board of trustees of such town, may adopt, alter, or amend such report and the assessments therein. Any person feeling aggrieved by such report shall have the right to appear before such committees and the common council of such city, or the board of trustees of such town, and make objection thereto, and shall be accorded a hearing thereon, and the common council of such city, or the board of trustees of such town, shall assess against the several lots or parcels of ground the several ⁴⁹⁴ amounts which shall be assessed for and on account of such improvement."

It will be noted that section 6 provides that after completion of the work the engineer shall report certain facts to the council—not make an assessment of the costs; that when such report is lodged with the council, it shall give two weeks' public notice of a time and place when and where a hearing can be had upon the facts reported by the engineer, before a committee appointed by the council to consider such report, and such committee shall, after a consideration of the report, recommend to the council the adoption or alteration of the same. And any person feeling aggrieved by such report shall have the right to appear before the committee and present objections thereto, and shall be accorded a hearing thereon, and the further right to carry his objections to the common council, where he shall also be accorded a hearing. After the hearings and objections are disposed of, the common council may adopt, alter, or amend the report and the assessments thereon, "and shall assess against the several lots or parcels of ground the several amounts which shall be assessed for and on account of such improvement."

It is contended that the statute limits the hearing before the committee and common council to errors of the engineer in stating the facts required of him, and that the power of the council, with respect to the report, is exhausted when it has verified such facts. We are unable to approve such construction. Section 6 requires that the engineer shall report certain facts to the council; that is to say, report such facts correctly; nothing short of a correct report is a compliance with the statute. We must view the subject as if the lawmakers assumed that the engineer would do his duty, and that when he submitted his report to the council it accurately stated the facts required of him. Besides, will it be seriously contended that if, by inadvertence, errors crept into the report, the engineer, or even the council, at any time before ⁴⁸³ final action thereon, did not have full power to correct it? *Ball v. Balfe*, 41 Ind. 221, 225. What reason, then, could there be for the legislature to deem it expedient to provide express authority in the council to correct, or cause to be corrected, errors in a report where none were reasonably supposed to exist, and where the power of correction would exist by irresistible implication? We may not attribute insincerity and dissembling to the legislators. We must believe that they meant something by these provisions beyond that granted by the old law, or why change it? The old law had been found efficient and authorized by the constitution.

In the search for legislative intent "the court will look to each and every part of the statute; to the circumstances under which it was enacted; to the old law upon the subject, if any; to other statutes upon the same subject, or relative subjects, whether in force or repealed; to contemporaneous legislative history, and to the evils and mischiefs to be remedied": *Barber etc. Co. v. Edgerton*, 125 Ind. 455, 460; *Reynolds v. Bowen*, 138 Ind. 434, 449; *Goodwin v. State*, 142 Ind. 117, 121.

The common council shall give two weeks' notice of a time and place when their committee shall consider the report and hear grievances. In drainage and other assessment proceedings, it is provided that the commissioners shall inquire into certain facts, assess benefits and damages, and "make report to the court; and the court shall fix a time for hearing the report," and, after ten days' notice of the filing thereof, those affected by the report may appear and remonstrate: *Burns' Rev. Stats.* 1894, secs. 5624, 5625.

It is even doubtful that the consideration of the report required of the committee, and the hearing they shall give thereon, relate to any other subject than the proposed assessments, or allotments of the cost of the improvement? After such hearing and consideration the committee is required to report their recommendations to the common council, and ⁴⁹⁶ the council, being thus advised, and upon further hearing of objections, may adopt the report as made by the engineer, distributing the total cost equally per front foot, or it may alter the report and the assessments therein; and when the conclusion of the council is reached, it shall assess against the several lots and parcels of ground the several amounts which shall be assessed on account of such improvement. The mandate of the statute, following the hearings, that the council shall assess the several amounts against the several parcels, clearly indicates the particular subject to be previously considered by the council and its committee. From the term "hearing" is necessarily implied the power to administer some adequate remedy.

The council may alter the assessments, that is, as indicated by the engineer's report on the front-foot rule. "Alter" is to "make otherwise": Webster's International Dictionary.

From these considerations we are unable to resist the conclusion that, upon the hearing provided in section 7, the common council have power to change assessments from the frontage rule in such cases as they may deem just. That the legislature may confer upon municipal officers the power to adjust special benefits accruing from such improvements to a fair and just basis, is well settled: *Garvin v. Daussman*, 114 Ind. 429, 435, 5 Am. St. Rep. 637; *Kizer v. Winchester*, 141 Ind. 694, 696; and the speedy and ample remedy afforded by this view of the statute is consistent with the spirit of the act and the nature of such improvement, which public convenience requires to be accomplished in the shortest practical period, as said in *Garvin v. Daussman*, 141 Ind. 436, 5 Am. St. Rep. 637: "It is essential to the public good that the necessity for street and other public improvements, and the cost of making them, and such other proceedings as are necessary to insure the prompt execution of the work, be determined and taken in a comparatively summary way."

An assessment is the "adjusting of the shares of a contribution by several toward a common beneficial object according ⁴⁹⁷ to the benefit received": *Bouvier's Law Dictionary*; *Anderson's Law Dictionary*.

From the power to alter is necessarily implied the power to add to or diminish. The absence of an express rule for guidance in the exercise of the power to alter does not impair it. It is sufficient if the power to change the assessment from the frontage rule exists. "It is a well-affirmed principle that where a power is conferred by a statute, everything necessary to carry out the purpose of the power conferred and make it effectual and complete will be implied": *Conn v. Board etc.*, 151 Ind. 517, 525; *Sutherland's Statutory Construction*, secs. 340, 341. Such implied power, however, will not authorize the employment of means and methods which may spring from the whims and caprices of administrative officers, according to varying circumstances, but will only permit the use of such reasonable, uniform, and consistent modes and measures as are calculated to accomplish the purpose in the spirit designed. How the power may be exercised in this instance must be determined from the spirit and scope of the whole act, of which said section 7 is a part, as aided by the spirit and principle running through other legislation upon the same and kindred subjects: *Sutherland's Statutory Construction*, sec. 288.

In an act relating to the opening and improvement of streets (*Burns' Rev. Stats. 1894, sec. 3633; Rev. Stats. 1881 and Horner's Rev. Stats. 1897, sec. 3170*), commissioners are commanded to make assessments on the basis of actual benefits. The same rule is required in drainage and free gravel road proceedings: *Burns' Rev. Stats. 1894, sec. 5658; Rev. Stats. 1881 and Horner's Rev. Stats. 1897, sec. 4288; Acts 1869, p. 74*. And this court has consistently held for thirty years that special benefits are the only foundation for special assessments: *New Albany v. Cook*, 29 Ind. 220; *Ross v. Stackhouse*, 114 Ind. 200; *Quill v. Indianapolis*, 124 Ind. 292; *Barber etc. Co. v. Edgerton*, 125 Ind. 455, 465.

The published notice calls attention of all persons affected ⁴⁸⁸ that the report of the engineer is before the council for consideration, and that the same is subject to such alteration as the council may deem just in adjusting the several assessments to the basis of actual benefits, and all persons concerned are bound to know that the prima facie assessments against their property are liable to be increased as well as decreased. That this court prior to 1889 supported the doctrine that the legislature had constitutional sanction to declare, as matter of law, that the special benefits to a particular district by an improvement were equally received by bordering property, and

equal to the total cost, has little force as an argument. The answer to it is that the injustice and hardship resulting from the doctrine were potential in securing legislative action for the amelioration of the rule. We think it evident that the assembly of 1889 determined upon a modification of the old rule, so far as it required an equal distribution of the cost of an improvement on all bordering property, without regard to the question of actual benefits. Not that the rule offended either the federal or state constitution as then interpreted by the federal and state courts (for no question of that character had been raised in this state), but because it was required by the simplest principles of justice. The act of 1889 must be tested by the usual canons of construction, and if from these it appears that the assembly took cognizance of the mischiefs resulting from the old law and provided a remedy in advance of constitutional requirement, the legislation is not to be discredited by the fact that the courts have come to restrict the constitutional limitations to the bounds set by the statute. The important inquiry is: Is the statute, as enacted in 1889, and as it now stands, antagonistic to any of the principles of the federal constitution as now construed by the United States supreme court?

Section 3 (Burns' Rev. Stats. 1894, sec. 4290; Horner's Rev. Stats. 1897, sec. 6773) provides: "In all contracts specified in the preceding section the cost of any street or alley improvement shall be estimated ⁴⁸⁰ [not assessed] according to the whole length of the street or alley, or the part thereof to be improved per running foot . . . and the city or incorporated town shall be liable to the contractor for the contract price of said improvement, and the owners of lots or parts of lots bordering on such street or alley, or the part thereof to be improved, . . . shall be liable to the city for their proportion of the costs in the ratio of the front line of their lots owned by them, to the whole improved line for street and alley improvements, . . . and the city or incorporated town shall have a lien upon such lots, or parts of lots, respectively, from the time such improvement is ordered, for such costs of improvement, collectible as hereinafter provided. . . . Such city or town shall be liable and pay for all that part of such street or alley improvement as shall be occupied by the street and alley crossings, and may order that any part of the total cost of any of the improvement in this act mentioned shall be paid out of the general fund."

The gist of these provisions is that in providing for the payment for an improvement, the expense of it shall be estimated, that is calculated, by the running foot; the city or town shall be liable to the contractor for the full contract price, and, to reimburse it, the owners of lots shall be liable to the city or town for their legal proportion of the cost, in the ratio of their several frontage to the whole frontage of the improvement; which liability shall constitute a lien upon abutting property in favor of the city or town from the time such improvement is ordered.

Three things may be noted in these provisions: 1. That the cost shall be estimated by the running foot, not so assessed; 2. That the liability shall relate to the frontage; and 3. That the liability and lien shall arise and attach at the time the improvement is ordered. There is nowhere to be found a mandate that the costs shall be assessed by the frontage rule or that property shall ultimately be required to contribute equally per front foot. The measure of liability ⁴⁹⁰ and lien here mentioned is only conjectural at most, since they arise before an ascertainment of the facts, by measurement, necessary to their definite determination. The provision can only mean that the liability and lien, when definitely ascertained by the report of the engineer, as required by section 6, as reviewed and adjudged by the common council, as required by section 7, shall relate back to the time of ordering the improvement.

If we read section 3 as providing a fixed rule of assessments as contended, the effect is to render section 7 meaningless and nugatory; for it clearly follows that if the rule of assessments is unalterably fixed by section 3, the hearing provided for in section 7 is nothing more than a cunningly devised illusion which expressly provides that the aggrieved property owners shall have the right to present their grievance to a tribunal that has no power to grant relief. This is mockery pure and simple, and implies insincerity and dissimulation in the law-makers, which we cannot indulge.

On the other hand, if we read section 3 as providing a basis for assessments which shall be prima facie correct, and which shall be held to be the true and correct assessments until assailed by the property owner, and shown upon a hearing, by a preponderance of proof, to be incorrect, or found to be unjust and altered and amended by the common council of its own motion, then we find sections 3, 6, and 7 in complete harmony, each effective and in accord with the other provisions

tribution from special benefits to the extent thereof is an election between methods of payment, and, when once chosen and entered upon, the procedure thereunder, as fixed by the law, is as imperatively commanded as if no other existed. The insistence, therefore, that the law contains no mandate that the common council or board of trustees shall, in any event, pay any part of the expenses of such improvements from the general revenues, cannot be sustained.

We are aware that this court has held that when the assessment scheme is pursued in making such improvements, the city or town assumes no primary liability, except for street and alley crossings; and what we here hold is that, as to a deficit only, if any, in special benefits, to meet the costs of an improvement, the city or town sustains the same primary obligation imposed upon it for street and alley crossings.

There is language used in *Terre Haute v. Mack*, 139 Ind. 99, and perhaps in other cases in this and the appellate court, not necessary to the decision of any question presented by the record, that appears in conflict with what is here decided, but, in so far as such language may so appear, it is disapproved. The canons of construction compel the interpretation which we have given this act, and so construed it is not obnoxious to any provision of the state or federal constitution, either under *Norwood v. Baker*, 172 U. S. 269, or the earlier decisions of the supreme court of the United States or of this state.

It is proposed by the improvement which affects the appellant to reduce the roadway of the street from seventy to fifty-six feet in width by an extension outward of the sidewalks from fifteen to twenty-two feet. The sidewalks have ⁴⁹⁴ heretofore, under corporation direction, been improved to a width of fifteen feet from the lot lines, the first ten feet paved with brick, and the balance to the curb graded and sodded; and it will be noted from the facts stated on the first page of this opinion that a part of the proposed improvement consists of filling the space between the brick sidewalk and the new curb with "good rich dirt," to be smoothed to a grade with the brick sidewalk and new curb, and covered "with good, live, fresh sod."

The point is made that, conceding the constitutionality of the Barrett law, the ordinance is void for want of power in the common council, under the statute, to assess the cost of filling with rich dirt and sodding against the abutters. The

first section of the act (Burns' Rev. Stats. 1894, sec. 4288) provides that the common council may "have the sidewalks graded and paved, or the whole width of the street graded and paved" under the provisions of the act. It may well be doubted if the authority here conferred can be extended to grading with a particular quality of earth, designed, not for the permanency of the improvement, but to produce a luxuriant vegetable growth. We think the words "grading and paving" are employed in the statute in the sense that the surface of the ground shall be made to conform to a regular line by cutting and filling with any sort of dirt suitable to the maintenance of the grade, and which may be most cheaply obtained, and smoothly covering the same with some hard substance, with the single view to permanency and easy travel for footmen and vehicles.

It is probably true, though we do not so decide, that the common council, in their general dominion over the streets, have implied power to construct lawns, and otherwise decorate those parts of the street not necessary to public travel, at the expense of the general treasury, but when it seeks to exercise the taxing power, and to levy upon a particular class the cost of an improvement, purely ornamental, it must be able to point to some express provision of the statute conferring ⁴⁹⁵ the right; no power to tax will arise by implication: *Doe v. Chunn*, 1 Blackf. 337, 338; *Lafayette v. Cox*, 5 Ind. 38; *Slessman v. Crozier*, 80 Ind. 487; *Gallup v. Schmidt*, 154 Ind. 196.

The council has express authority of law to require the planting of shade trees at the expense of the abutters (Burns' Rev. Stats. 1894, sec. 3541; Horner's Rev. Stats. 1897, sec. 3106, cl. 46) but it cannot be said that this right carries with it the power to construct lawns or other decorations in the streets, and to enforce the cost thereof against the abutters. The power is at least doubtful, "and any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation and the power denied": *Dillon on Municipal Corporations*, 4th ed., sec. 89, approved; *Crawfordsville v. Braden*, 130 Ind. 149, 152, 30 Am. St. Rep. 214; *Williams v. Davidson*, 43 Tex. 1, 33; *Corvallis v. Carlile*, 10 Or. 139, 45 Am. Rep. 134; *Kirkham v. Russell*, 76 Va. 956.

We therefore hold that the ordinance, so far as it provided for the grading with rich dirt and sodding as a part of the

proposed improvement was void as being ultra vires, and that the appellant was entitled to an injunction against so much of said proposed improvement. Equity will enjoin the exercise of an unauthorized power: *Sackett v. New Albany*, 88 Ind. 473, 45 Am. Rep. 467; *Board etc. v. Gillies*, 138 Ind. 667, 673; *Dillon on Municipal Corporations*, 4th ed., sec. 914.

If entitled to any part of the relief sought, the demurrer to the complaint should have been overruled.

Judgment reversed, with instructions to overrule the demurrer to the complaint.

Baker, J., dissents from so much of the opinion as affirms the constitutionality of the Barrett law.

BAKER, J., DISSENTED. He could not, he said, under the rules of construction as he understood them, find the meaning in section 7 of the "Barrett law" that had been given to it in the opinion of the court. "The language of the section," he said, "furnishes no foundation for the construction adopted. It makes no allusion to special benefits. It fails to command the city to refrain from assessing upon the abutting lot an amount in excess of the special benefits actually received by it, and to refrain from assessing upon the property in the taxing district an amount in excess of the sum total of the special benefits actually received by the several parcels of contributing property. It fails to command the city to pay from the general treasury the excess of cost above the total special benefits—the part that benefits only the municipality at large. Benefits and damages are the varying degrees above and below zero on the compensation scale. If a lot-owner's special benefits were below zero, from what source and by what method is he to be made even? The section fails to provide. These omitted matters might have been fully and explicitly supplied by the legislature by tacking them onto the word 'hearing,' but it did not do so."

He could not agree with his brethren that the power to administer some adequate remedy is necessarily implied from the term "hearing" used in section 7, and that that hearing must be a determination of special benefits actually received. He could not, he said, find in that section the "implied power" which authorizes the common council to change the basis of the assessments; and he claimed that the insertion into section 7 of the elements which the legislature failed to include not only violates the plain language of that section, but destroys other sections of the act. His idea of "all hearings" seems to have been that there must be a charge filed against a defendant, and that the tribunal in which it is filed must determine the case upon the charge filed. "The hearing," he said, "provided for in section 7 is, according

to the language of the act, a hearing upon the report of the engineer and the assessments therein." He therefore considered that the "hearing" provided for therein was intended merely to determine the question whether or not the assessing officers had faithfully performed their duties according to statute and had correctly reported the assessments as determined by the method prescribed for them to act upon, and did not imply a hearing on special benefits as a matter of fact.

He could not agree in the statement that the constitutionality of the front-foot method had been considered in the courts of Indiana only in reference to the provision requiring uniformity and equality in taxation, and never in reference to "just compensation" and "due process of law"; and with respect to the question of "legislative expediency" in providing for the payment of street improvements, he said: "The legislative department of this state has always understood that the only basis for special assessments was special benefits; but that it was a matter of legislative discretion to declare absolutely, by law, that the special benefits were always and invariably equal to the cost of the improvement; that, if in sewer and highway and drainage acts the equality of cost and benefit were not absolutely declared by law, but were left open to the determination of the truth by the assessing officers, whose assessment of actual benefits was reviewable before some tribunal duly clothed with power and procedure to that end, it was a matter of legislative grace and not a matter of constitutional compulsion; and that, if the legislature chose to exercise its discretion by declaring that the cost of street improvements should be assessed upon the abutting property by frontage, the citizen could no more complain than in any other case in which the legislature had determined a question of legislative expediency."

"In making up the Barrett law," he said, "the legislature did not strike out into new fields; but they took as the foundation to work upon the old street improvement statutes of this state, which are confessedly based upon the arbitrary front-foot method, and adopted from other states certain elements that stood as component parts of the arbitrary front-foot method."

The learned judge declared that material portions of several sections of the act, as well as "the whole of the interlaced sewer law," had been omitted from consideration by his brethren in passing upon the validity of the law. He believed that the "Barrett law" as enacted was unconstitutional, and he was also of the opinion that that law as construed by his brethren was unconstitutional. Some of his reasons for thinking so were, that, in his opinion, the law did not afford the property owner, after the "hearing" provided for, an opportunity to challenge the correctness of the assessment; that if the prescribed mode of fixing assessments by frontage were deleted from the statute as enacted, there would not be a word left limiting the council to any method or prescribing any rule of procedure whatever; that a property owner

does not, under that law as construed, have a tax that is assessed on the basis of his actual special benefits without affirmative action on his part, at the "hearing," to see that it is put on that basis; that a lawful assessment must show on its face the principle according to which it is laid, which would appear under the "Barrett law" as enacted, but not as construed; that, under that law as enacted, the legislature created a uniform taxing district, over all of which the contractor had his lien, but that, under that law, as construed, an irregular district is created, without any valid reason inhering in the subject matter of the act to warrant the irregularity, and the lien of the contractor diminished to that extent; that the notice provided for in section 7 is not sufficient to give the council jurisdiction over any subject except "objections," nor any person except one "aggrieved"; that under the "Barrett law," as enacted, no conflict of interest arose among the council and the property owners and the contractor, but that under that law, as construed, a three-cornered conflict of interests at once arises, and the council is made the exclusive and final judge in its own case; and that is an axiom of the law that no man can be a judge in his own case. "It seems to me," he said, "that the property owner is subjected to a tax 'without due process of law.'"

STREET ASSESSMENTS.—THE POWER TO ASSESS the cost of a street improvement upon abutting property is embraced within the sovereign power of taxation primarily reposed in the legislature, but which it may constitutionally delegate to local municipal governments, with or without restraints or limitations: *Ladd v. Portland*, 32 Or. 271, 67 Am. St. Rep. 526.

STREET ASSESSMENTS—PROPERTY BENEFITED.—Local assessments for street improvements may be imposed upon the real property benefited thereby: *Violett v. Alexandria*, 92 Va. 561, 53 Am. St. Rep. 825; but only to the extent of the peculiar benefits to such property: *Hutcheson v. Storrie*, 92 Tex. 685, 71 Am. St. Rep. 884. The legislature cannot authorize a municipal corporation to assess upon abutting property the cost of public improvements, without regard to the special benefits derived, or in a sum materially in excess thereof: *Hutcheson v. Storrie*, 92 Tex. 685, 71 Am. St. Rep. 884. And a provision in a city charter authorizing the improvement of streets at the cost of abutting property, in proportion to frontage, without regard to special benefits to the property, is unconstitutional: *Hutcheson v. Storrie*, 92 Tex. 685, 71 Am. St. Rep. 884.

STREET ASSESSMENTS—NOTICE AND HEARING.—An ordinance is unconstitutional and lacks the essential element of due process of law when it authorizes an assessment against property, but makes no provision for notice, and affords the owner no opportunity to be heard concerning the correctness of the assessment: *Garvin v. Daussman*, 114 Ind. 429, 5 Am. St. Rep. 637; and see *Hutcheson v. Storrie*, 92 Tex. 685, 71 Am. St. Rep. 884. But an act providing for a special assessment on the property benefited by a change of street grade is not unconstitutional because it does not give the owners a right to be heard as to who shall be appointed assessors, or a right to appeal from such appointment: *Kelly v. Minneapolis*, 57 Minn. 294, 47 Am. St. Rep. 605.

LOCAL ASSESSMENTS—INJUNCTION.—Equity will not enjoin the collection of assessments for local improvements except under special circumstances such as leave the complainant without any remedy at law, and bring his case under some of the recognized heads of equity jurisdiction, or where it is clear that the tax has been imposed without authority and is void: *Murphy v. Mayor*, 6 *Houst.* 108, 22 *Am. St. Rep.* 845.

STATE v. CLAUSMEIER.

[154 *Indiana*, 590.]

SHERIFFS—PHOTOGRAPHS OF PRISONERS—RIGHT TO TAKE.—A sheriff may lawfully take the photograph of a prisoner, and ascertain his height, weight, name, residence, place of birth, occupation, and the color of his eyes, hair, and beard, without being liable therefor on his official bond, where no force or violence is used, and the officer deems it necessary to secure the prisoner's safekeeping, or to retake him more readily should he escape.

SHERIFFS—LIBEL.—THERE IS NO LIABILITY ON THE OFFICIAL BOND of a sheriff for language used by him concerning a person in his custody on a charge of crime, though it is slanderous or libelous *per se*, for, in using it, he is not acting as an officer.

SHERIFFS—PUBLICATION IN ROGUES' GALLERY—LIBEL—NONLIABILITY.—A sheriff is not liable on his official bond for sending out to police departments and individuals photographs of a prisoner in his custody, with writings on the backs thereof, giving his description and the charge against him, for such an act is not one done in an official capacity.

W. M. Ninde, B. F. Ninde, and C. Holder, for the appellant.

Morris, Barrett & Morris, for the appellees.

000 **MONKS, J.** This action was brought by the relator against appellee, Clausmeier, on his official bond as sheriff, and the other appellees, sureties on said bond, to recover damages for an alleged breach thereof. A demurrer for want of facts was sustained to the complaint, and, the relator refusing to plead further, judgment was rendered in favor of appellees.

It is alleged in the complaint that while the relator was confined in the jail of Allen county, and in the custody of said Clausmeier as sheriff, on a charge of forgery, said Clausmeier, on the thirteenth day of November, 1896, "without the consent, and against the wish of said relator, compelled him, by force of commands, and threatening physical compulsion, to come forth out of his cell in said jail into the office of said

jail, and then and there, intentionally, wrongfully, unlawfully, and maliciously took the picture of said relator, and on the same day without the consent and against the wish and notwithstanding the protest of relator, said Clausmeier weighed and measured said relator, and by observation of the body of said relator, and by inquiry of him, and by means of records, obtained a personal description of relator"; that on said thirteenth day of November, 1896, and thereafter, said Clausmeier, "maliciously intending to ruin the relator's fair name and reputation, and to bring said relator into public infamy, disgrace, and scandal, by holding said relator up to scorn, ridicule, contempt, and execration, and to impair his enjoyment of general society by imputing and implying that said relator had committed a crime and was a rogue and a criminal, by associating the picture of the relator with the pictures of criminals, and representing the said relator as a criminal and as a person whom the police should watch, and whom the officers of the law generally should observe and watch more critically than said officers and said police do mankind generally who are not known as criminals, by placing the picture of said relator on cards which are used for mounting the pictures of ⁶⁰¹ criminals, and using said pictures for the express and sole purpose of holding said relator forth as a criminal, on said day did maliciously and falsely make and publish of and concerning the relator the following false, scandalous, malicious, and defamatory words, and picture of said relator in connection therewith [the description of the relator, and the charge against him, and by whom he was arrested, as shown on the back of said picture, are set forth in the complaint]; that the pictures of persons taken and mounted as aforesaid on cards of that style, with the words and combination of words printed and written thereon, as a whole, when exhibited and used as these were, have a definite and well-known meaning that said persons are criminals and rogues, and that said pictures and words make what are well and popularly known as the 'Rogues' Gallery'; that said Clausmeier, before the relator had any opportunity to prove his innocence of the charge for which he was committed, wrongfully, unlawfully, and maliciously caused large numbers of the picture of said relator, and said words and combination of words on the reverse side thereof, to be sent and placed in the police department of the city of Fort Wayne, and to divers persons to the relator unknown, and has widely published the libel here complained of; that said relator was

innocent of said charge, and was afterward honorably acquitted of the said charge placed against him. Whereby and by means of which acts aforesaid said relator has been greatly prejudiced in his credit and reputation, and brought into public scandal, infamy, and disgrace, and has suffered in his good name, fame, and reputation, and has suffered damage thereby," etc.

It is the duty of a sheriff to confine in jail and safely keep all persons in his custody awaiting trial on a charge of crime until lawfully discharged, and, if they escape, to pursue and recapture them. A sheriff, in making an arrest for a felony on a warrant, has the right to exercise a discretion, not only as to the means taken to apprehend the ⁶⁰² person named in the warrant, but also as to the means necessary to keep him safe and secure after such apprehension until lawfully discharged; and he has the right to take such steps and adopt such measure as in his discretion may appear to be necessary to the identification and recapture of persons in his custody if they should escape. Unless this discretion is abused through malice, wantonness, or a reckless disregard for and a selfish indifference to the common dictates of humanity, the officer is not liable: *Firestone v. Rice*, 71 Mich. 377, 15 Am. St. Rep. 266; *Diers v. Mallon*, 46 Neb. 121, 50 Am. St. Rep. 598. It is the duty of the said officer to search the person and take from him all money or other articles that may be used as evidence against him at the trial: *Rusher v. State*, 94 Ga. 363, 47 Am. St. Rep. 175, and note 180. And he may take from him any dangerous weapons, or anything else that said officer may, in his discretion, deem necessary to his own or the public safety, or for the safekeeping of the prisoner, and to prevent his escape; and such property, whether goods or money, he holds subject to the order of the court: *Closson v. Morrison*, 47 N. H. 482, 93 Am. Dec. 459; *Commercial etc. Bank v. McLeod*, 65 Iowa, 665, 54 Am. Rep. 36; *Reifsnyder v. Lee*, 44 Iowa, 101, 24 Am. Rep. 733; *Holker v. Hennessey*, 141 Mo. 527, 540, 64 Am. St. Rep. 524, 532, and note 537.

In *Closson v. Morrison*, 47 N. H. 482, 93 Am. Dec. 459, and *Holker v. Hennessey*, 141 Mo. 527, 540, 64 Am. St. Rep. 524, 532, it was held that said officer might not only take any deadly weapon he might find on the person, but also money or other articles of value found upon the person, though not connected with the crime for which he was arrested and could not be used as evidence on the trial thereof, by means of

which, if left in his possession, he might procure his escape, or obtain tools, implements, or weapons with which to effect his escape.

803 It would seem, therefore, if, in the discretion of the sheriff, he should deem it necessary to the safekeeping of a prisoner, and to prevent his escape, or to enable him the more readily to retake the prisoner if he should escape, to take his photograph, and a measurement of his height, and ascertain his weight, name, residence, place of birth, occupation, color of his eyes, hair, and beard, as was done in this case, he could lawfully do so. The complaint does not charge that any physical force was used to induce the relator to have his negative taken, or to furnish the sheriff the information above mentioned not obtainable by observation.

It is evident that the substantial cause of action set forth in the complaint is an alleged libel of the relator by the appellee, Clausmeier, in the publication of said pictures and the writing on the backs thereof, by sending the same to the police department of Fort Wayne, and to the divers persons to the relator unknown. Conceding, without deciding, that if a sheriff commits an assault and battery upon a person in his custody, or fails to use ordinary care to protect him against acts of violence from others, he and his sureties are liable on his official bond to such person therefor, yet it does not follow that a sheriff and his sureties are liable on his official bond for libelous words published by said sheriff of and concerning a person in his custody. If a sheriff have a person in his custody on a charge of crime, and orally, or in writing, uses language concerning said person which is slanderous or libelous per se, while he may be liable to an action therefor, there is no liability on his official bond on account thereof. A person who is a sheriff, in speaking or writing such language, under such circumstances, is not guilty of any misfeasance, malfeasance, or nonfeasance as such officer. He is neither performing an official duty in a proper or improper manner, nor doing any act whatever as an officer.

It is evident that said Clausmeier, in sending said photographs with the writing on the backs thereof, was not acting 804 either *virtute officii* or *colore officii*. Under such circumstances, there is no liability on an official bond: *State v. Givan*, 45 Ind. 267; *State v. Kent*, 53 Ind. 112. It is unnecessary, therefore, to determine whether or not the photographs and

the words thereon were libelous when considered in connection with the other allegations of the complaint.

Judgment affirmed.

SURETIES—NONLIABILITY FOR UNOFFICIAL ACTS.—The sureties on the official bond of a chief of police cannot be held liable for his acts in receiving and detaining in the city prison persons arrested without process by police officers, as such acts are not done by virtue of his office: Note to *Brown v. Weaver*, 71 Am. St. Rep. 521.

CASES
IN THE
SUPREME COURT
OF
IOWA.

**EARL v. CHICAGO, ROCK ISLAND & PACIFIC RAIL-
WAY COMPANY.**

[100 Iowa, 14.]

RAILROADS — NEGLIGENCE — TRESPASSERS.—A person who goes into the caboose attached to a freight train to visit a passenger, without business there or expectation of becoming a passenger, is a trespasser, to whom the railroad company owes no duty until it has knowledge that he is there; and it is not liable for causing his death in the absence of willful wrong or gross negligence on its part or that of its employes.

RAILROADS—GROSS NEGLIGENCE.—Unusual or reckless conduct by the employes of a railroad company does not necessarily constitute gross negligence.

C. D. Wright, J. W. Foster, and Neal & Neal, for the appellant.

Ricker, Crocker & Christie and W. D. Milligan, for the appellee.

¹⁵ **LADD, J.** The deceased had aided one Whitehead in loading stock in a car, and somewhat later had walked with him from town to the caboose of the train, on which the latter was about to leave, and both entered it. They were in conversation, but not transacting any business, and the deceased was not, and did not expect to be, a passenger. He had no business in the caboose, and his purpose in going there does not appear. Whitehead testified: "I do not know what his purpose was in coming into the caboose. I had no business to transact with Earl at the caboose. Didn't transact any business with him there." This caboose was attached to train

No. 55, which had arrived from Casey on its way west. The switching had been completed, and the engine and cars taken up were about to be attached to the train on the main track. They had been there a few minutes when Whitehead arose to go to the door. He listened to Earl's statement concerning the bunch of cattle which the latter thought could be bought on his return, and at that instant, noticing the near approach of an engine and train from the east, jumped to the ground, and avoided injury. The caboose was run into and Earl killed. The engineer of the extra was about nine hundred feet from the caboose when he first saw it, but supposed it to be an old one on the sidetrack. The train was moving at the rate of twelve or fifteen miles per hour. On coming within six hundred feet, he noticed that it was on the main track, and immediately reversed the engine and applied the air-brakes. When near, he stepped to the ground, fearing the engine might not stop in time to avoid collision. The engineer testified that he used all appliances to stop the train, and this could be accomplished in moving from forty-two to forty-four rods, while the witness for the appellee was of opinion that it could have been stopped within thirty-five yards. There was evidence, though contradicted, tending to show that no emergency signal was given, and no signal to set brakes. It may be said that there was evidence from which ¹⁶ negligence on part of the engineer might have been found, but neither he nor any employé of defendant knew that Earl or anyone else was within the car.

1. That deceased was a trespasser was established by the uncontradicted evidence. Not a passenger, nor in the caboose by license or invitation, the defendant owed him no active duty. He had no more right to enter and occupy the caboose, under the circumstances shown, than to stand on its track, where he would be conceded to be a trespasser. The mere fact that passengers might be carried furnishes no excuse to one not sustaining that relation for using the car. Caboosees and coaches are not ordinarily held out to the public as places for visiting or the transaction of business, and those not passengers or employés, who enter for such purposes, do so without right. It is not claimed, nor could it be under the evidence, that the deceased went on the car as an escort, or by way of rendering necessary assistance to a passenger, or by the license or permission of the company: See *Railway Co. v. Lawton*, 55 Ark. 428, 29 Am. St. Rep. 48, and note. The situa-

tion of the deceased was not different from that of a person stealing a ride, to whom the company owes no duty, save that of refraining from willful or wanton injury: Toledo etc. Ry. Co. v. Brooks, 81 Ill. 249; Railroad Co. v. Meacham, 51 Tenn. 428; Dowd v. Chicago etc. Ry. Co., 84 Wis. 105, 36 Am. St. Rep. 917; Gillis v. Pennsylvania R. R. Co., 59 Pa. St. 129, 98 Am. Dec. 317; Alabama etc. R. R. Co. v. Harris, 71 Miss. 74. In the last case the court said: "To the trespassers on its trains, just as to trespassers on its tracks, the railroad company owes precisely the same duty which it owes to all mankind, and this duty is exactly what each man owes to every other; that is, abstention from wanton and willful injury in the use of one's property." The rule is thus stated in 3 Elliott on Railroads, section 1255: "A railroad company owes trespassers no contract duty. Indeed, as already stated, the general rule is that it owes them no duty, except not to willfully ¹⁷ injure them, and this rule applies to those who are attempting to steal a ride, or otherwise trespass upon the company's cars." Mere negligence is never sufficient; to be actionable, it must be in violation of some duty. The principle is thus put in Sweeny v. Old Colony etc. R. R. Co., 10 Allen, 368, 87 Am. Dec. 644: "There can be no fault or negligence or breach of duty where there is no act or service or contract which a party is bound to perform or fulfill. All the cases in the books in which a party is sought to be charged on the ground that he has caused a way or other place to be encumbered, or suffered it to be in a dangerous condition, whereby accident and injury have been occasioned to another, turn on the principle that negligence consists in doing or omitting to do an act by which a legal duty . . . has been violated. Thus a trespasser, who comes on the land of another without right, cannot maintain an action if he runs against a barrier, or falls into an excavation there situated. The owner of lands is not bound to protect or provide safeguards for wrongdoers." The general duty of a railway company to run its trains with care becomes a particular duty to no one until he is in position to have a right to complain of the neglect. The tramp who steals a ride cannot insist that it is a duty to him; neither can he when he makes a highway of the railway track, and is injured by the train: Cooley on Torts, 66; Bishop on Noncontract Law, sec. 446; 16 Am. & Eng. Ency. of Law, 411. Here lies the defect in the reasoning of the second division of the opinion in Way v. Chicago etc. Ry. Co., 73 Iowa, 466, in which but

three judges concurred. That the company owed no duty to Way is conceded, and yet his right of recovery is based on precisely the same grounds as though he were rightfully in the car. As to him there was no duty due until his situation was known. But neither the engineer nor brakeman knew or had any reason to know that he was in the caboose. Then, by the authorities, the company was liable only for injuries resulting from willful wrong or gross negligence. If section 1307 of the code of 1873 is to have ¹⁸ the interpretation there given, then the cases denying liability to trespassers on the track until discovered were erroneously decided: *Masser v. Chicago etc. Ry. Co.*, 68 Iowa, 602; *Burg v. Chicago etc. Ry. Co.*, 90 Iowa, 106; *Thomas v. Railway Co.*, 93 Iowa, 252; *Heiss v. Chicago etc. Ry. Co.*, 103 Iowa, 591; *Keefe v. Chicago etc. Ry. Co.*, 92 Iowa, 182, 54 Am. St. Rep. 542. There is no reason why one rule should be applied to the latter, and another to trespassers in the car. While the caboose may have passengers, the track may have obstructions and employes thereon who are entitled to protection. There can be no negligence as to either until a duty owing by the company has been violated. Besides, that section makes no pretense of fixing the degree of negligence which will entitle an injured person to recover. What was said does not seem to have been necessary in deciding the case, and we are inclined to construe it as dicta. But, if it be regarded otherwise, it has been overruled by the cases referred to.

2. The eleventh instruction was erroneous in submitting whether Earl was rightfully in the caboose. As we have seen, he was there as a trespasser, and his presence was unknown to any of the defendant's employes. The court instructed the jury that, "if you further find that the defendant's agent or employé, in handling, managing, or operating said train, or in running, handling, and operating the extra freight train alleged, performed such duties in a manner so unusual or reckless as to cause the collision alleged, and endangered the lives or safety of persons who might be rightfully in said caboose, then they were guilty of negligence, and if the death of plaintiff's intestate was caused thereby, and if such negligence on the part of defendant's agents or employes was the natural, immediate, and proximate cause of the death of said Earl, and if he was not guilty of negligence contributing thereto, then, and in such case, defendant would be liable, notwithstanding the fact that he was not a passenger on said train at the time

of the accident, and notwithstanding ¹⁹ the fact that the relation of passenger and carrier did not exist between the said Earl and said defendant." The mere fact of the conduct of the employes being unusual or reckless was not sufficient. In a sense every act of negligence is unusual or reckless, as people generally exercise ordinary care. To warrant recovery, the employes must have been guilty of a willful wrong, or of such wantonry or recklessness in their conduct as to constitute gross negligence. Other instructions followed closely the language of *Way v. Chicago etc. Ry. Co.*, 73 Iowa, 466, in support of which our attention has not been called to any authority, and which, as we have seen, is opposed to the repeated decisions of this court.

Reversed.

RAILROADS—TRESPASSER ON TRAIN.—A railroad company is not answerable to a trespasser on a train for negligence, and owes him no duty other than that of doing him no wanton or willful injury: *Richmond etc. R. R. Co. v. Burnsed*, 70 Miss. 437, 35 Am. St. Rep. 656. On the liability of railroad companies to persons accompanying and assisting passengers, see the extended notes to *Illinois Cent. R. R. Co. v. O'Keefe*, 61 Am. St. Rep. 97; *Little Rock etc. Ry. v. Lawton*, 29 Am. St. Rep. 54, 55.

PASSENGERS, WHO ARE, and when they become such, is the subject of the monographic note to *Illinois Cent. etc. R. R. Co. v. O'Keefe*, 61 Am. St. Rep. 75-104.

STATE v. ABLEY.

[109 Iowa, 61.]

CRIMINAL LAW—ASSENT OF OWNER AS DEFENSE TO CRIME.—A person who knows of a crime contemplated against him may remain silent and permit matters to go on, for the purpose of apprehending the criminal, without being held to have assented to the act. Such action on his part is no excuse for the crime.

CRIMINAL LAW—ASSENT OF OWNER AS DEFENSE TO CRIME—ACTS OF SERVANT.—If a clerk in a store, having neither the custody, nor the right to admit anyone thereto, at the time a burglary is committed therein, and for the purpose of apprehending the accused, knowing that the crime is to be committed, but without the knowledge or consent of the owner of the store, loans a detective a key thereto in order to allow a duplicate to be made for the use of the accused, the acts of the clerk are no defense to the crime. His assent to the criminal entry of the store by the accused by means of such key cannot be imputed to the owner of the store.

CRIMINAL LAW—EVIDENCE.—EXCLUSION ON CROSS-EXAMINATION of questions bearing on the motive or feeling of a witness for the state against the accused is not prejudicial error, where these matters are made immaterial by the admitted conduct of the accused.

CRIMINAL LAW—WITNESS—IMPEACHMENT—PREVIOUS CRIME.—A witness for the prosecution in a criminal case cannot be compelled to state whether, at some previous time, he has not committed a crime.

Taylor & Evans and E. P. Andrews, for the appellant.

H. C. Liggett, J. H. Scales, M. Remley, attorney general, and C. A. Van Vleck, for the state.

WATERMAN, J. The building entered was owned by the firm of Schaeffer & Reynolds. No question is made but that defendant broke and entered the store, and took goods therefrom; but it is claimed that he cannot properly be convicted of the offense charged, because the entry was made with the assent of the owners or their agent. The facts upon which this claim is based are as follows: One Clock was marshal of the town in which the building was located. Prior to the commission of the crime, Clock (as he claims, for detective purposes) had been counseling and advising with defendant, not only in relation to this particular offense, but also as to the two breaking and entering other buildings. So zealous was the officer in this questionable line of duty and so anxious was he to impress ⁶³ defendant with the belief that he was earnest in his criminal intentions and would keep faith in the matters plotted, that Clock alone, on one occasion, broke and entered another store building, belonging to one Bryan, with a key furnished by defendant, and took from it some goods. Of course, he claims that this was done merely to lead defendant on. Clock testifies that the mayor of the town had previous information from him of defendant's intention to enter the Bryan store. The mayor, who was a witness, does not testify on this point; but, however that fact may be, Clock admits that Bryan, the owner, had no such information, and that the entry was effected without his knowledge or consent. One Will Reynolds, a clerk in the employ of Schaeffer & Reynolds, had a key to the building in question in this case. Shortly before the commission of the offense charged, Clock borrowed this key to get an impression from which defendant could make another key which would open the door, and such a key was afterward made by defendant. At this time Clock

told Reynolds, the clerk, the use which he wished to make of the borrowed key, and also of defendant's criminal purpose. The breaking and entering were done in the night-time. During the day Clock had warned several citizens of the contemplated crime—among others, Schaeffer, a member of the firm which owned the store. He told Schaeffer that defendant had a key to the store, and would enter it that night. He did not, however, tell him where or how the key had been obtained. The persons so warned were requested to be on guard and assist in defendant's arrest after the offense was completed. This plan was carried out. Schaeffer and the others watched. Clock and defendant came upon the scene about midnight. Defendant opened the door and entered the store, Clock following. As they came out with the property taken, defendant was arrested.

One who has committed a criminal act is not entitled to be shielded from its consequences merely because he was ⁶⁴ induced to do so by another. If there is anything in the defense here, it must be because the entry was assented to by Schaeffer. But the evidence tends strongly to show that Schaeffer, though not objecting, did not personally assent. One who knows of a crime contemplated against him may remain silent and permit matters to go on, for the purpose of apprehending the criminal, without being held to have assented to the act: *People v. Liphardt*, 105 Mich. 80; *State v. Adama*, 115 N. C. 775; *State v. Sneff*, 22 Neb. 481; *Thompson v. State*, 18 Ind. 386, 81 Am. Dec. 364; *State v. Jansen*, 22 Kan. 498. The question of the owner's personal assent was left to the jury, and, we think, under instructions that fully and accurately stated the law. But certain instructions were asked by defendant and refused by the court, the thought of which was to predicate the assent of the owner upon the acts of the clerk, Reynolds. The evidence does not show on the part of the members of the firm any knowledge of Reynolds' conduct. Of course, if the clerk, with criminal intent, aided in any way in the entry of this building, he would be a party to the crime. But that is not what is claimed by defendant. He contends that if the clerk, though without criminal intent, assented to the entry, such assent will be imputed to the master. Some text-writers lay down the rule in terms broad enough to give support to this contention, and the following cases are cited by counsel as sustaining it: *Regina v. Johnson*, 1 Car. & M. 218; 41 Eng. Com. L. 123; *People v. Collins*, 53 Cal. 185; *Saunders v. People*, 38 Mich. 218; *People v. Mc-*

Cord, 76 Mich. 200; *Allen v. State*, 40 Ala. 344, 91 Am. Dec. 476. In the California case the agent of the owner, who was pretending to take part in the burglary, alone entered the building, and the decision was founded on this fact. The other cases are each based upon one of two states of fact: Either the servant had custody of the building and a right to open it at the time he did, or at the time he assented thereto, or the owner was ^{as} aware of the part the servant was taking, and acquiesced therein. Neither of these conditions prevailed in the case at bar. It does not appear that Reynolds had charge of the building, or had any right to admit persons therein, after it was closed for the night; and, as we have said, his conduct in the transaction with Clock was unknown to the owners. We do not think the clerk's conduct can be used as a shield for defendant: 1 Bishop's Criminal Law, 5th ed., sec. 262; *State v. Jansen*, 22 Kan. 498. The instructions were rightly refused.

Clock, when on the witness stand, stated on cross-examination that he had owed defendant money. He was then asked whether defendant had been trying to collect it, and also whether the indebtedness still remained. The court sustained objections to these questions. Questions were also ruled out which called for statements made by the witness to defendant as to his (witness') former life, and further sought to elicit an admission from witness that he had at some previous time committed a crime. This last matter was clearly inadmissible. As to the other testimony sought, the court might properly, in the exercise of its discretion, have received it. Clock's conduct in this whole transaction was so reprehensible and suspicious in character that a wide latitude of cross-examination might have been allowed. But we are not able to say the trial court's discretion was abused. The defendant could not have been prejudiced. The evidence sought was of a collateral nature. So much of it as had a bearing on Clock's motive or feeling toward defendant was made immaterial by the latter's admitted conduct in the transaction of which complaint is made.

We cannot leave this case without again, and in more emphatic terms, expressing our disapproval of the conduct of Clock, who, if he did not suggest, at least encouraged, the commission of the offense by defendant. We are inclined to ^{as} doubt whether defendant, if left to himself, would have perpetrated the crime of which he has been convicted. Clock

stimulated him with advice, aided him by acts, and, through unremitting effort, spurred him on to his undoing. This conduct was outrageous, if, indeed, it was not criminal, and it is aggravated, rather than excused, by the fact that Clock was a peace officer. Frail human nature is prone enough to crime; it should not be purposely tempted; and in this case, it was urged to act. Defendant was sentenced to imprisonment in the penitentiary for a term of three years. In view of the facts, we shall reduce the term to six months. With this modification, the judgment will be affirmed.

BURGLARY—ASSENT OF OWNER.—Where the owner of a burglarized building has previous notice that the crime is to be committed, and makes no effort to prevent the commission, but adopts means to secure the arrest of the burglar, the latter's liability to punishment is not thereby changed: *Thompson v. State*, 18 Ind. 386, 81 Am. Dec. 364. But a breaking is not burglarious where the entrance is made by the procurement and with the consent of the owner, or by a person acting in his employment: *State v. Stickney*, 53 Kan. 308, 42 Am. St. Rep. 284. See further on this subject the notes to *People v. Richards*, 2 Am. St. Rep. 387; *Speiden v. State*, 30 Am. Rep. 129, 180; *Thompson v. State*, 81 Am. Dec. 365-367; *Allen v. State*, 91 Am. Dec. 482, 483.

CROSS-EXAMINATION INVOLVING INCRIMINATION is discussed in the extended notes to *Evans v. O'Connor*, 75 Am. St. Rep. 332-339; *State v. White*, 27 Am. Rep. 140-142; *Fries v. Brugler*, 21 Am. Dec. 55-62.

HILPIRE v. CLAUDE.

[109 Iowa, 159.]

ADOPTION—ACKNOWLEDGMENT OF ARTICLES.—An acknowledgment of an instrument adopting a child, required to be made like that of a deed to real estate, may be taken by a deputy clerk of court under a statute giving him authority to take acknowledgments of instruments in writing, although another statute provides for the acknowledgment of conveyances of real estate before "some judge or clerk," without specifically mentioning deputies. Such statutes should be construed together.

ADOPTION.—INDEXING OF ARTICLES of adoption under the original name of the child and also under its name after adoption is a sufficient compliance with a statute providing for an index of the name of the parents as grantor, and of that of the child as grantee in its original name. Indexing is not essential to the validity of the instrument, and an omission to index exactly as required by statute does not render it invalid, and cannot work any prejudice.

ADOPTION—REVOCATION OF WILL.—Under statutes providing that all rights, duties, and relations between the parent and

child by adoption, including the right of inheritance, shall be the same as exist by law between parent and child by lawful birth, and that the subsequent birth of a legitimate child to the testator before his death shall operate as a revocation of his will, the will of a testator is revoked by his subsequent adoption of a child.

Ladd & Rogers, for the appellant.

C. M. Nagle, for the appellees.

¹⁰⁰ GIVEN, J. 1. On the fourth day of October, 1884, Henry G. Bernard and his wife, the defendant Catherine Claude, duly executed a joint will, in which they devised to each other all property which either might own at the time of his ¹⁰¹ or her decease. On the twenty-third day of February, 1893, Henry G. Bernard died intestate, seised in fee simple of the land in question, and leaving his wife surviving him, who since intermarried with her codefendant, Julian Claude. Said will was duly admitted to probate. Henry G. and Catherine Bernard had no children born to them. In the year 1880 the plaintiff, then aged seven years, and known as Emma Sophia Hazelman, went to live with Mr. and Mrs. Bernard, and continued to live with them until Mr. Bernard's death, and thereafter with Mrs. Bernard until she (Emma Sophia) was twenty-one years of age, about which time she married. On March 6, 1889, articles of adoption as follows were executed, which were filed for record March 24, 1889.

"Articles of Adoption.

"This article of agreement, made and entered into by and between the undersigned, the contracting parties hereto, witnesseth: 1. That August Hazelman, the only living parent lawfully having the care and providing for the wants of the child hereinafter named, and all of the county of Lasalle and state of Illinois, desire to give and consent thereto, and by these presents do give and consent to give unto Henry G. Bernard and Catherine Bernard, of Woolstock township, in the county of Wright and state of Iowa, my child, now being called and known by the name of Emma Sophia Hazelman, and of sixteen years of age, for the purpose of adoption as their own child. 2. That the parties hereto desire, consent, and agree that hereafter said child shall be called and known by the name of Emma Sophia Bernard. 3. That in consideration of the gift of said child for the purposes hereinbefore named, we, the said Henry G. Bernard and Catherine Bernard, do by these presents adopt and confer upon said child all the rights, privi-

leges, and responsibilities which would pertain to the child if born to us in lawful wedlock. Signed this 6th day of March, A. D. 1889.

"HENRY G. BERNARD.

"CATHERINE BERNARD.

"AUGUST HAZELMAN."

102 2. This instrument was executed under the provisions of chapter 7, title 15, of the code of 1873, section 2309 of which requires that, "such instruments in writing shall be also signed by the person adopting, and shall be acknowledged in the same manner as deeds affecting real estate are required to be acknowledged." This instrument was acknowledged on March 6, 1889, by Mr. and Mrs. Bernard, before "Ed Hartsock, deputy clerk of the district court" of Wright county. Appellees insist that under the statutes then in force said deputy clerk had no authority to take said acknowledgment, and that the instrument is therefore of no effect. Section 1955 of said code, as it then stood, provided that instruments in writing by which real estate shall be conveyed or encumbered, "if acknowledged within this state, must be so before some court having a seal, or some judge or clerk thereof, or some justice of the peace or notary public." This section was amended by chapter 99 of the acts of the twenty-second general assembly, adding the words "or before the county auditor or his deputy," which amendment was approved April 9, 1888. Section 277 of said code, as it then stood, provided that: "The following officers are authorized to administer oaths, and take and certify the acknowledgment of instruments in writing: Each judge of the district court; each judge of the circuit court; the clerk of the supreme court; each clerk of the district court as such, or as clerk of the circuit court; each deputy clerk of the district and circuit courts; each county auditor; each deputy county auditor," etc. This section was amended by chapter 126 of the acts of the twenty-first general assembly, by inserting "the deputy clerk of the supreme court." It will be observed that deputy clerks of courts are not included in section 1955; that county auditors and their deputies were not included therein until the amendment of April 9, 1888; and that both deputy clerks of the district and circuit courts and auditors and their deputies are included in section 277. In Long v. Schee, 86 Iowa, 619, it was intended that section 1955 163 absolutely requires acknowledgment of deeds of real estate be made before some court

having a seal, or one of the officers named therein. This court said: "It appears to us that this construction ignores the provisions of section 277." It was held that the acknowledgment of a treasurer's deed before the county auditor on the sixth day of April, 1876, was a valid acknowledgment, under section 277. As section 277 authorizes the officers therein named to take acknowledgment of deeds affecting real estate, and deputy clerks are therein specified, we hold the acknowledgment of the instrument in question to be valid.

3. Said section 2309 also provides that such instruments as that in question "shall be recorded in the recorder's office in the county where the person adopting resides, and shall be indexed with the name of the parents by adoption as grantor, and the child as grantee, in its original name, if stated in the instrument." This instrument was duly filed for record March 23, 1889, and was indexed under the letter B, as follows: "Bernard, Emma Sophia, adopted, 69."—and under the letter H, as follows: "Hazelman, Emma Sophia, adoption of, 69." While this indexing is not strictly as required by the statute, in that it does not present the parties in the relation of grantor and grantee, it is such a compliance with the statute that prejudice to any person was impossible because of the slight variation. Section 2310 of the code of 1873 provides that "upon the execution, acknowledgment, and filing for record of such instrument, the rights, duties, and relations" between the parent and child attach. Indexing is not essential to the validity of the instrument, and the omission of the recorder to index exactly as provided will not render it invalid. The cases cited are not in point. In *Shearer v. Weaver*, 56 Iowa, 585, it is said: "Our statute having provided specifically the means whereby one sustaining no blood relation to an intestate may inherit his property, the rights of inheritance ¹⁰⁴ must be acquired in that manner, and can be acquired in no other way." In that case the articles of adoption were not recorded during the lifetime of the person adopting, and were therefore held not to be valid. In *Long v. Hewitt*, 44 Iowa, 363, the instrument was not executed by the person intending to adopt. In *Tyler v. Reynolds*, 53 Iowa, 146, the instrument was not filed for record until after the death of the party making the adoption. In *Gill v. Sullivan*, 55 Iowa, 341, the instrument was almost entirely destroyed by accident, so that recording was impossible. In *McCollister v. Yard*, 90 Iowa, 622, the articles were not filed for record un-

til after the child came of age, though in the lifetime of the adopting parent. It was held that as the articles only took effect upon filing for record, and, as the child was not then a minor, the articles were not valid.

4. This brings us to consider whether this legal adoption of the plaintiff has the effect of revoking the previously executed will of Mr. Bernard, the adopting father. The relations and rights of these persons being exclusively statutory, we must determine this question in the light of the statutes, as found in the code of 1873, under which the transactions occurred:

"Sec. 2307. Any person competent to make a will is authorized, in manner hereafter set forth, to adopt as his own the minor child of another, conferring thereby upon such child all the rights, privileges, and responsibilities which would pertain to the child if born to the person adopting in lawful wedlock."

"Sec. 2310. Upon the execution, acknowledgment, and filing for record of such instrument, the rights, duties, and relations between the parent and child by adoption shall, thereafter, in all respects, including the right of inheritance, be the same that exist by law between parent and child by lawful birth.

"Sec. 2311. . . . But no action of the court in the premises shall affect or diminish the acquired right ¹⁶⁵ of inheritance on the part of the child, to the extent of such right in a natural child of lawful birth."

If deceased had left no will, there could be no question of plaintiff's right to share in his estate as his child, under section 2453. Plaintiff's contention is that her adoption by the deceased has the same effect upon his previously executed will as if she had been born to him in lawful wedlock at the time of her adoption. Defendants cite section 2329 of said code, as follows: "Wills can be revoked in whole or in part only by being canceled or destroyed by the act or direction of the testator with the intention of so revoking them, or by the execution of subsequent wills." They insist that wills cannot be otherwise revoked, and that, as this one was not so revoked, it is in full force. In *Alden v. Johnson*, 63 Iowa, 126, this court said: "The sole question in the case, namely, whether the birth of the daughter after the execution of the will, in law, operated to revoke it, is presented upon the pleadings in the case, which need not be particularly recited. This court has often ruled that the birth of a child of the testator operates as a revocation of a will before made": Citing cases. This

is conceded to be the law in this state, and it is clear therefrom that formerly the revocation of wills was not limited to the modes provided in said section 2329. Section 3276 of the present code provides that "the subsequent birth of a legitimate child to the testator before his death will operate as a revocation." Under section 2335 of the code of 1873 (section 3279 of the present code), the birth of posthumous children does not revoke the will, but the interests of heirs, devisees, and legatees are charged ratably in favor of the child.

5. Having found under the code of 1873 the subsequent birth of a legitimate child to the testator before his death operated as a revocation of his prior wills, we now inquire whether the adoption of a child has the same effect. This question is before this court for the first time, and, owing to differences in the statutes of this ¹⁰⁰ and other states, we find but little aid in the decisions of other courts. The language of our statutes is very broad, the adoption conferring upon the adopted child "all the rights, privileges, and responsibilities which would pertain to the child if born to the person adopting it in lawful wedlock": Code 1873, sec. 2307. As if to emphasize this language, it is further provided that "the rights, duties, and relations between the parent and child by adoption shall, thereafter [i. e., after the execution, acknowledgment, and filing of record of such instrument], in all respects, including the right of inheritance, be the same that exists by law between parent and child by lawful birth": Code 1897, sec. 2310. Plaintiff cites several cases wherein the right of adopted children to inherit from and through the adopting parent was passed upon, but in none of them is the question before us considered. In *Wagner v. Varner*, 50 Iowa, 532, it was held that the adopted child could inherit from his natural parents. In *Warren v. Prescott*, 84 Me. 483, 30 Am. St. Rep. 370, it was held that an adopted child can take a legacy given to one of its adopting parents, and thus prevent the legacy from lapsing when the legatee dies before the testator. Other cases cited are equally foreign to the question under consideration. This question was directly considered in *Davis v. Fogle*, 124 Ind. 41. The court says: "The question presented for decision is, Does the adoption of a child, under the statutes of this state, operate to revoke an antecedent will of the adopting father, he having made no provision in the will or otherwise for such adopted child?" The statute of the state provides that from and after adoption such child "shall be entitled to and receive all the rights and

interest in the estate of such adopted father or mother, by descent, or otherwise, that such child would do if the natural heir of such adopted father or mother." It is said: "But we think the statute relating to the revocation of wills is decisive of the question involved in this case"; and it was held that as that statute did not provide that the adoption ¹⁰⁷ of a child should operate as a revocation of a prior will, and as revocations can be only made as provided, the will was not revoked by the adoption of the child. We have seen that, under the code of 1873, revocations of wills were not limited to the modes provided in section 2329. Therefore, *Davis v. Fogle*, 124 Ind. 41, is not authority for the same conclusion in this case. The same is true of *In re Gregory*, 15 Misc. Rep. 407, 37 N. Y. Supp. 925. The statute under consideration in that case contained several exceptions to the child's right to inherit, while ours contains none. In *In re Comassi*, 107 Cal. 1, a married woman had executed her will, and thereafter, and after the death of her husband, remarried; and the question was whether her marriage had the effect of revoking her will, under a certain statute, and it was held that it did not. The will was contested by a child that had been adopted prior to its execution, and solely upon the claim that the marriage revoked it. In *Davis v. King*, 89 N. C. 441, the question was whether a petition and decree of court whereby Richard W. King adopted his illegitimate son were admissible in evidence to show a revocation of the will offered for probate. The court held that wills could only be revoked as provided by statute, and that as the transcript offered did not purport to be a testamentary paper, nor to contain revocatory words, it was inadmissible. In *In re Sunderland's Estate*, 60 Iowa, 732, the child was adopted by W. P. Sunderland and wife under a special act of the general assembly of Louisiana providing that the child shall inherit from the adopting parents, "as if she were their legitimate child, without prejudice to forced heirs, if any there be": *Laws* 1860, p. 131. It was also provided that, should the child survive the parents and die without issue, then all the property she may have inherited from either of said parents should pass to the heirs of said parents. W. P. was the son of John Sunderland, and died before his father. The adopted child claimed that, as child of W. P., she was entitled to inherit his share ¹⁰⁸ of his father's estate, under section 2454 of the code of Iowa of 1873, which is as follows: "Grandchildren.—If any one of his children be dead, the heirs of such child shall inherit his share in

accordance with the rules herein prescribed in the same manner as though such child had outlived his parents." This court, resting the case solely upon said special act, held that the adopted child had no right in the estate of John Sunderland. In *Sewall v. Roberts*, 115 Mass. 262, A had in 1825 made a voluntary conveyance (without reserving any power of revocation) of personal property to an annuity company in trust to pay the income to him for life, and upon his death to be transferred to his administrator in trust for the special use and benefit of his children, and, in case he died without issue, then to his mother, if she survived him, and, if not, then to his or her heirs equally. In 1865 he adopted a child. "Held, also, that the adopted child took the remainder of the property as a 'child,' under the settlement, as one of the legal consequences and incidents of the natural relation of parents and children." It is manifest that these cases fall short of determining the question under consideration, and we are not referred to, nor do we find, any one that does. Our statute, in declaring the rights of adopted children, does not contain any exceptions, as do those to which our attention has been called, and it is difficult to conceive of language that would more clearly place them upon the same level in all respects with children of lawful birth. The reasons for the rule that subsequent birth of a legitimate child to the testator before his death operates as a revocation of his prior will apply with equal force to a subsequent adoption under a statute like ours, containing no exceptions or qualifications, and declaring that the rights, duties, and relations between parent and child by adoption shall "in all respects, including the right of inheritance, be the same that exist by law between parent and child by lawful birth." While these relations and rights are statutory, and may not be enlarged beyond the plain meaning of ¹⁶⁹ the statute, that meaning should not be defeated by any strained construction. We conclude that it is the legislative intention to place adopted children upon the same level as children of lawful birth, in all respects, and therefore that the decree of the district court should be reversed.

ADOPTED CHILD—STATUS OF.—An adopted child becomes entitled to succeed to the estate of his adopting parents to the same extent and subject to the same contingencies and limitations as if he were a natural child: See the monographic note to *Van Matre v. Sankey*, 39 Am. St. Rep. 223. In a legal sense, he is the child both of his natural and of his adopting parents, but he is not a bodily heir: *Clarkson v. Hatton*, 143 Mo. 47, 65 Am. St. Rep. 635; and the adoption of an illegitimate child by the father and

his wife does not render such child his "issue," so as to defeat a remainder created by will, and made contingent upon his leaving no children: Note to Warren v. Prescott, 30 Am. St. Rep. 372.

ADOPTION STATUTES—CONSTRUCTION OF.—Adoption proceedings must be in substantial conformity with the provisions of the statute, but the statute must be given a liberal construction to uphold proceedings under it: Nugent v. Powell, 4 Wyo. 173, 62 Am. St. Rep. 17. Compare Watts v. Dull, 184 Ill. 86, 75 Am. St. Rep. 141; and see the extended note to Van Matre v. Sankey, 39 Am. St. Rep. 213-218.

BLAIR v. OSTRANDER.

[109 Iowa, 204.]

PROCESS—FEDERAL—POWER OF STATE OVER.—A state has no independent power to limit or affect the proceedings in, or process from, federal courts.

JUDGMENTS—LIEN.—**JUDGMENTS OF FEDERAL COURTS** are liens upon the lands of the judgment debtor throughout the district in which the court has jurisdiction, when similar judgments of state courts are made liens by the law of the state in which such federal judgment is rendered.

JUDGMENTS OF FEDERAL COURTS—LIEN OF.—**RE-ENACTMENT OF STATE STATUTES**, ineffectual when passed by reason of their attempting to regulate the lien of judgments of federal courts without authority, is not necessary in order to make them operative, after Congress has authorized such legislation.

CONTRACTS—VALIDITY—PRESUMPTION.—If it is contended that a statute is void, as impairing the obligation of the contract in suit and the pleadings do not show when the contract was executed, it cannot be presumed that the contract antedated the statute.

H. E. Long, for the appellant.

J. A. Storey and S. McPherson, for the appellees.

205 **ROBINSON, C. J.** The material facts stated in the petition are as follows: In the year 1884, one D. J. Clark, then the owner of a section of land in Adair county, executed mortgages thereon to the Creston Loan and Trust Company. The mortgages were afterward foreclosed, the land sold to satisfy the mortgage debts, sheriff's deeds were issued, and the defendants Ostrander and Early now own the interests conveyed by the sheriff's deeds. The mortgages were foreclosed in the district court of Adair county, and the decrees of foreclosure were rendered on the twenty-eighth day of August, 1889. On the fourteenth day of May, 1889, the plaintiff recovered in the

United States circuit court for the southern district of Iowa judgment against Clark for nineteen thousand two hundred and five dollars and sixteen cents. The plaintiff was not made a party to the foreclosure proceedings, and for that reason claims the right to redeem from the sales. He had never filed a transcript of his judgment in Adair county, and his alleged right to redeem depends upon the effect to be given to certain federal and state statutes in regard to judgment liens, and the filing of transcripts in counties other than those in which the judgments are rendered. Section 2882 of the code of 1873, as amended by chapter 129 of the acts of the seventeenth general assembly, enacted in 1878, provided that "judgments in the supreme, district, or circuit court of this state are liens upon the real estate owned by the defendant at the time of such rendition, and also upon all he may subsequently acquire for the period of ten years from the date of the judgment." Section 2 of the chapter cited is as follows: "Judgments in the district or circuit court of the United States, if rendered in this state, may be made liens upon the real estate owned by the defendant, and also upon all he may subsequently acquire for the period of ten years from the date of the judgment by filing an attested copy of the judgment in the office of the clerk of the state district court of the county in which the land lies; and no lien shall attach to the lands in any county of ²⁰⁰ this state, until the date of filing such transcript, except in the county wherein the judgment was rendered, in which case the lien shall attach from the date of such rendition." It is well settled that the legislature of a state has no independent power to limit or affect the proceedings in, or process from, federal courts: *Wayman v. Southard*, 10 Wheat. 1; *United States Bank v. Halstead*, 10 Wheat. 51; *Beers v. Haughton*, 9 Pet. 329. Judgments were not liens on land at common law, but were made liens by early English statutes, and in this country by the statutes of different states: 1 Jones on Liens, sec. 13; Freeman on Judgments, sec. 339; 12 Am. & Eng. Ency. of Law, 104. Judgments of federal courts are liens upon the real estate of the judgment debtor, where similar judgments of state courts are made liens by the law of the state: *Ward v. Chamberlain*, 2 Black, 430. If, in such a case, a judgment of the state court operates as a lien only within the county in which the judgment is rendered, nevertheless a judgment of the federal court would operate in like manner, not only in the county in which it was rendered, but, if not restricted by rule or statute, would oper-

ate throughout the district in which the court had jurisdiction: *Massingill v. Downs*, 7 How. 760; *Freeman on Judgments*, sec. 405; 12 Am. & Eng. Ency. of Law, 104. Prior to the first day of August, 1888, Congress had not enacted any law which authorized or gave effect to the statutes of this state to which we have referred. It follows, from the authorities cited, that prior to that date judgments of the district and circuit courts of the United States were liens upon real estate of the judgment debtors subject to execution throughout the districts in which the judgments were rendered, notwithstanding the limitation attempted to be made by the statutes of this state. On the date specified, chapter 729 of the acts of the first session of the fiftieth Congress was approved. That provided "that judgments and decrees rendered in any circuit or district court of the United States within any state shall be ²⁰⁷ liens on property throughout such state in the same manner and to the same extent and under the same conditions only as if such judgments and decrees had been rendered by a court of general jurisdiction of such state; provided, that whenever the laws of any state require a judgment or decree of a state court to be registered, recorded, docketed, indexed, or any other thing to be done, in a particular manner or in a certain office or county, or parish in the state of Louisiana, before a lien shall attach, this act shall be applicable therein whenever and only whenever the laws of such state shall authorize the judgments and decrees of the United States courts to be registered, recorded, docketed, indexed, or otherwise conformed to the rules and requirements relating to the judgments and decrees of the courts of the state." It is claimed that the statute enacted by the general assembly of this state in the year 1878 was void when passed, and the act of Congress set out did not give it effect. That it was not effectual prior to the taking effect of the act of Congress is, as we have seen, true; but it does not follow that the end sought to be accomplished could be attained only by the enactment of a new statute after the act of Congress was passed. In the case of *In re Rahrer*, 140 U. S. 545, the effect of a statute of the state of Kansas in regard to the sale of intoxicating liquors within the state was considered. It was passed before the act of Congress of August 8, 1890, entitled "An act to limit the effect of the regulations of commerce between the several states and with foreign countries in certain cases," which made subject to the laws of the state intoxicating liquors transported into it, and it was contended that, as the

Kansas statute had not been re-enacted, it was without effect as to intoxicating liquors taken into the state. But the supreme court of the United States held, in effect, that the state statute was not effectual as against intoxicating liquors brought into the state until the act of Congress took effect, not because the act of the state was void, but for the reason that ²⁰⁸ there was an impediment to its enforcement, which the act of Congress removed, and it was said that there was "no adequate ground for adjudging that a re-enactment of the state law was required before it could have the effect upon imported, which it had always had upon domestic, property." Although the state statute considered in that case was enacted in the exercise of the police power of the state, and the one in question was not, we are of the opinion that the same general principle applies in both cases. The statutes of this state in terms required the filing of transcripts of judgments rendered by both state and federal courts in counties other than those in which the judgments were rendered, in order to create liens on real estate in such other counties. The act of Congress of August 1, 1888, made judgments of circuit and district courts of the United States, rendered within any state, liens on property throughout such state in the same manner, and to the same extent, and under the same conditions, as if such judgments had been rendered by a court of the state having general jurisdiction. To that extent the statute of this state in regard to judgments of the state courts was adopted. The provision that the act should take effect in a state, the laws of which required certain things to be done in respect to a judgment before a lien should attach, only whenever the laws of that state should authorize the doing of the same things relating to judgments of the federal courts, did not adopt any law of this state, but the effect of the act was to remove any obstacle to state legislation, or to confer authority for it, and there does not appear to have been any more reason for requiring the re-enactment of the state law in order to give it effect than there was for the re-enactment of the Kansas statute considered in *In re Rahrer*, 140 U. S. 545: See *First Nat. Bank v. Clark*, 55 Kan. 219.

It is contended in argument that the statutes we have considered are unconstitutional as to indebtedness contracted before the federal statute took effect, for the alleged reason ²⁰⁹ that, if enforced as against such indebtedness, they would impair the obligation of the contract by which the indebtedness was created. The case of *McCracken v. Hayward*, 2 How.

608, and cases holding the rule therein announced, are cited as supporting the claim thus made. We have no occasion to determine whether it is well founded. The petitions do not show when the indebtedness on which the plaintiff's judgment was rendered was contracted, and we are not authorized to presume that it was incurred before the act of Congress of 1888 took effect. A transcript of the plaintiff's judgment not having been filed in Adair county, the judgment was not a lien on the land in question when the decrees of foreclosure were rendered and the sheriff's sales were made, and the plaintiff is not entitled to redeem from the sales. The demurrers to the petitions were properly sustained, and the judgments of the district court are therefore affirmed.

PROCESS, FEDERAL.—STATE LAWS cannot in any matter limit or affect the operation of the process or proceedings of the national courts: See the monographic note to *Sellers v. Corwin*, 24 Am. Dec. 311.

THE LIEN OF JUDGMENTS OF THE FEDERAL COURTS arises under the state laws, and results from the adoption of those laws by Congress or by the United States courts; and in a state where the judgment of the state court creates a lien, the judgment of a federal court has that operation throughout the district in which its jurisdiction extends: See the monographic note to *Sellers v. Corwin*, 24 Am. Dec. 310, 312; *Rock Island Nat. Bank v. Thompson*, 173 Ill. 593, 64 Am. St. Rep. 137, and note.

DAVENPORT v. BOYD.

[109 Iowa, 248.]

MUNICIPAL CORPORATIONS—ESTOPPEL TO CLAIM LAND.—Counties, cities, and towns may so deal with land within their limits as to be estopped to assert title thereto, although the statute of limitations may not run against them.

MUNICIPAL CORPORATIONS—ESTOPPEL TO CLAIM LAND.—If a city taxes land and levies special assessments upon it for thirty years, and an individual occupies under a claim of right in good faith for nineteen years, without deceiving or misleading the officers of the city, and its rights could have been easily ascertained at all times, the city is estopped to assert title to the land as against such individual.

E. M. Sharon, for the appellant.

Davison & Lane, for the appellee.

²⁴⁰ ROBINSON, C. J. The material facts admitted or established by the evidence are as follows: The land in controversy is a strip of ground sixty feet in width and one hundred and seventy-eight feet in length, between Harrison and Ripley streets, which extend from north to south, and is claimed by the plaintiff to be a part of Seventh street, which is sixty feet wide, and extends from east to west, and would constitute a part of that street if it were made continuous. The defendant claims to be the absolute owner of the tract. In the year 1852 it was included in the plat of McIntosh's second addition to the city of Davenport, as an unnamed tract between two blocks. It was replatted in the year 1856, and the tract shown as a part of Seventh street. A portion of the property of which it had been a part was again replatted in the year 1878 by one Watkins, who then owned it, and the tract in controversy was then shown as an unnamed tract between two blocks. In October, 1879, Watkins executed to the defendant a quitclaim deed for the tract, describing it as a strip of land sixty feet in width, adjoining the south side of the west half of original block 1 of McIntosh's second addition to the city of Davenport. At the same time the defendant purchased of Watkins the two lots in the block described, north of and adjoining the tract in question. ²⁵⁰ Within a few weeks after receiving the deed he moved a house onto the tract, and has since held possession of it. The highest part of the tract was about twenty-five feet above the grade of the street, and the defendant leveled it at a cost of three hundred dollars. Although the defendant took possession of the land under a quitclaim deed, and should have known that it did not vest in him the title of the tract, he appears to have claimed to own it since he obtained the deed, and has in all respects treated it as his own. The city taxed it from the year 1867 until the year 1896, inclusive, as "the sixty-foot south of the west half of block 1, McIntosh's addition (second) to the city of Davenport," and the defendant has paid all the taxes so levied since he obtained the deed from Watkins. A sewer tax was also levied against the tract, and all of the installments due when this action was commenced had been paid by the defendant. Three years before the trial he was required by the plaintiff to construct a sidewalk in front of the tract, and did so. He claims title through the conveyance by Watkins to him, and by adverse possession, and alleges that the plaintiff is estopped by the course it has pursued respecting the tract from claiming title to it.

The defendant has failed to show a valid title to the tract acquired through the Watkins conveyance, and for the purposes of this case it may be conceded, as claimed by the plaintiff, that the statute of limitations will not run against a municipal corporation: See *Waterloo v. Union Mill Co.*, 72 Iowa, 437; *Taraldson v. Incorporated Town etc.*, 92 Iowa, 187. But it is the well-settled rule in this state that counties, cities, and towns may so deal with real property within their limits as to be estopped to assert title to it; and that has most frequently occurred by refraining from exercising acts of ownership over the property, by treating it as owned by private persons, and by subjecting it to the payment of various public charges. Thus in *Smith v. Osage*, 80 Iowa, 84, it was said: "The city will be estopped to set up any claim to land to which the ²⁵¹ right of public use has been abandoned by subjecting it to taxation as private property," and numerous decisions of this court were cited to sustain that statement of the law. The case of *Simplot v. Dubuque*, 49 Iowa, 630, is in some respects much like this case, and in that it was held that the right of the city to occupy the land there in controversy for the purposes of a street must be regarded as abandoned, and that the city was estopped to deny the right of the plaintiff to the land: See, also, *Austin v. Bremer Co.*, 44 Iowa, 155; *Audubon County v. American Emigrant Co.*, 40 Iowa, 460; *Adams County v. B. & M. R. R. Co.*, 39 Iowa, 507; *Iowa R. R. Land Co. v. Story County*, 36 Iowa, 48. The cases of *Smith v. Gorrell*, 81 Iowa, 218, *Orr v. O'Brien*, 77 Iowa, 253, 14 Am. St. Rep. 277, and *Davies v. Huebner*, 45 Iowa, 574, furnish illustrations of the rule that there may be an estoppel by abandonment and adverse occupation under claim of right for more than ten years. In this case the city, as we have seen, taxed the property and levied special assessments upon it for thirty years, and the defendant occupied it under a claim of right for nineteen years, before this action was commenced. It does not appear that the defendant deceived or misled the officers of the plaintiff, nor that he was guilty of any bad faith. The rights of the plaintiff could have been readily ascertained at all times. In view of the well-established facts of the case, we are of the opinion that it is governed by the rule of *Smith v. Osage*, 80 Iowa, 84, and similar cases. It follows that the judgment of the district court was right, and it is affirmed.

MUNICIPAL CORPORATIONS—ESTOPPEL TO CLAIM LAND. Mere adverse possession of a public street or alley in a city for the statutory period cannot confer title, but when such possession is accompanied by other circumstances which would render it inequitable that the public should assert its rights to regain possession, then, upon the principle of estoppel, a party may be protected against the assertion of such rights, in order to prevent manifest wrong and injustice: *Crocker v. Collins*, 37 S. O. 327, 34 Am. St. Rep. 752; *Reuter v. Lawe*, 94 Wis. 800, 59 Am. St. Rep. 392. But see the monographic note to *Schneider v. Hutchinson*, 76 Am. St. Rep. 492-495.

BOWEN v. PORT HURON ENGINE AND THRESHER COMPANY.

[109 Iowa, 255.]

GARNISHMENT—JUDGMENT IN—EFFECT OF.—The legal effect of a garnishment judgment is to sequester or set aside the property or money of the defendant in the hands of the garnishee to the payment of the plaintiff's judgment.

GARNISHMENT—JUDGMENT IN AS SATISFACTION.—A garnishment judgment is prima facie a satisfaction or pro tanto satisfaction of the plaintiff's judgment against the principal defendant.

GARNISHMENT—JUDGMENT IN AS A SATISFACTION.—If the garnishee, at the time the plaintiff takes judgment against him, is solvent, the defendant, upon paying the difference between the garnishment judgment and judgment in the main action, is entitled to have the latter canceled.

Jamison & Smith, for the appellant.

G. W. Bowen, in propria persona, for the appellee.

²⁵⁵ **DEEMER, J.** Some time prior to January 13, 1892, plaintiff commenced an action against the defendant. The action was aided by attachment, and several garnishments were effected under the writ. A trial of the main action was had, resulting in a judgment for plaintiff, and at the same time a judgment was taken against one of the garnishees for the larger part of the debt. Thereafter defendant paid into court the difference between the amount of the judgment against the garnishee and the judgment in the main action, and then filed a motion asking for its discharge, claiming that the judgment against it had been fully satisfied, and should be canceled of record. It also claims that the garnishee was solvent when the judgment was rendered against him, and insolvent when de-

defendant made its motion, and that, had plaintiff exercised diligence, he might have collected the judgment against the garnishee. ²⁵⁷ There is no evidence to support the claim that the garnishee is now insolvent. Indeed, it conclusively appears that he has ample property subject to execution to satisfy the judgment against him. The controlling question is, What effect shall be given the judgment against the garnishee? An attachment is auxiliary to the action in which it issues; and garnishment is a mode of attachment. As a general rule, no lien is created on the property in the hands of the garnishee, although it partakes of the nature of a proceeding in rem: Woodward v. Adams, 9 Iowa, 474; Moor v. Walker, 46 Iowa, 164; Gilmore v. Cohn, 102 Iowa, 254. Some of the cases seem to hold that it is a mode of attachment, differing in no essential particular from an attachment by levy and seizure, except in the mode of enforcement. We have never gone to the extent of holding that it creates a specific lien upon the property or money in the hands of the garnishee, but have said, in effect, that it gives the plaintiff a specific right, over and above that of a mere general creditor to the indebtedness or property for the payment of his claim: Citizens' State Bank v. Council Bluffs Fuel Co., 89 Iowa, 618. After due notice to the principal defendant, the plaintiff may have judgment against the garnishee: Code, sec. 3946. And the statutes provide that the judgment in the garnishment action condemning the property or debt in the hands of the garnishee to the satisfaction of the plaintiff's demand is conclusive between the garnishee and the defendant. In Stadler v. Parmlee, 14 Iowa, 175, it is said: "The legal effect of a judgment against a garnishee upon his answer, condemning the property or debt in his hands, is to satisfy, to the extent thereof, the indebtedness between the garnishee and the principal debtor." See, also, Peck v. Parchen, 52 Iowa, 46, wherein it is held that garnishment under a foreign judgment was a pro tanto defense to an action brought by the original creditor against his debtor. These cases hold that, after judgment against the garnishee, the judgment defendant is barred of his right of action ²⁵⁸ against the garnishee and, so long as the parties remain in that situation, there is no method by which he can enforce his claim against him. The legal effect of the garnishment judgment is to sequester or set aside the property or money in the hands of the garnishee to the payment of plaintiff's judgment. From the time of the service of notice the garnishee is liable to plaintiff for the value of all

Of defendant's property in his hands subject to execution, and to the amount of all debts owing by him to defendant at time of service: *Kesler v. St. John*, 22 Iowa, 565; *Hughes v. Monty*, 24 Iowa, 499; *First Nat. Bank v. Davenport etc. R. R. Co.*, 45 Iowa, 126; *Buck-Reiner Co. v. Beatty*, 82 Iowa, 353. Again, a garnishment proceeding is, in effect, a suit by the defendant against his debtor, by which plaintiff is subrogated to the rights of the original creditor: *Huntington v. Risdon*, 43 Iowa, 517. The effect of the garnishment, as we have seen, is to deprive the defendant of his property or money, and when it proceeds to judgment it should, at least, be held a prima facie satisfaction; or, if the amount of the judgment against the garnishee is not as much as the judgment against the principal defendant, a prima facie pro tanto satisfaction of the principal judgment. This is the rule applied to the levy of executions on chattels: *Lucas v. Cassaday*, 2 G. Greene, 208; *Reed v. Crowthait*, 6 Iowa, 219, 71 Am. Dec. 406; *McWilliams v. Myers*, 10 Iowa, 325; *First Nat. Bank v. Rogers*, 13 Minn. 407, 97 Am. Dec. 239; and the many cases cited in 2 Am. & Eng. Ency. of Law, 2d ed., 703. And we see no reason why it should not obtain in garnishment proceedings. In *Peck v. Parchen*, 52 Iowa, 46, it is said that while proceedings for the satisfaction of a judgment are going on, and property sufficient to satisfy it is held under execution, the judgment cannot be sued on. While none of the cases cited are directly in point, the case at bar seems to call for the application of like rules. There can be no doubt, we think, that the garnishment judgment is prima facie a satisfaction, or pro tanto satisfaction, of plaintiff's claim. Of course, plaintiff may show, if he can, that the defendant in garnishment is not responsible, or that he (plaintiff) obtained no valuable right in virtue of his garnishment, or that he has released the judgment against the garnishee to the defendant in judgment, with his (defendant's) consent: See *Howard v. Bennett*, 72 Ill. 297; *First Nat. Bank v. Rogers*, 15 Minn. 381; *Duncan v. Harris*, 17 Serg. & R. 436. But this rule, as to release, does not apply if the attempted abandonment of the proceedings was without defendant's consent, if there was no necessity for the abandonment: *Young v. Read*, 3 Yerg. 297; *McIver v. Ballard*, 96 Ind. 76; *Trapnall v. Richardson*, 13 Ark. 543, 58 Am. Dec. 338.

It is clear that the case ought to be governed by these rules. Plaintiff took his judgment against the garnishee, who, so far as the record shows, is perfectly solvent. By so doing, he, in

effect, levied on sufficient property of the defendant—after the defendant had paid the balance—to satisfy his (plaintiff's) judgment. He offers no excuse for not levying execution and collecting his claim. Defendant has been prevented from collecting from his debtor, and could take no steps against him to enforce his demand. He was powerless to protect himself by direct action against the garnishee, and was subject to his financial vicissitudes. It will not do to say that he might have paid the main judgment in full, and then proceeded against his debtor. That any execution defendant may do to relieve property which is being jeopardized while in the hands of an officer on execution, but he is not obliged to take that course. He may not be able to pay the amount, and trust to success against the garnishee. No such burden should be placed upon him.

It is true that plaintiff, at the time of the hearing on the motion, tendered the judgment he held against the garnishee to the defendant, but he did not offer to assign it, nor did he do anything until long after defendant had paid the balance ²⁰⁰ of the main judgment. As we have seen, defendant was not obliged to accept this tender.

Plaintiff should have been diligent in the collection of his judgment against the garnishee; and, if there be any doubts of its collectibility, he, and not the defendant, should suffer the results of delay. *Coburn v. Currens*, 1 Bush, 242, and *Norris v. Hall*, 18 Me. 332, lend support to these conclusions. The motion should have been sustained, and the judgment is reversed.

Garnishment as Satisfaction of Principal Debt.

There can be no doubt that authority firmly establishes the doctrine that the satisfaction of a valid judgment against a garnishee operates to merge or satisfy the liability of the principal debtor either pro tanto or in full, as the case may be. Some of the cases seem to decide that the mere rendition of such a judgment and the fact that it remains enforceable works such a satisfaction of the principal debt although the judgment remains unpaid, while other cases hold that an unpaid judgment of this character has no effect as a satisfaction of the principal debt. It shall be our aim to collate cases in the different classes mentioned.

A recovery against a garnishee inures to the benefit of the original creditor by having it applied to that creditor's debt to the plaintiff in attachment: *Brown v. Somerville*, 8 Md. 444. If after final judgment against the defendant in attachment the gar-

garnishee shall satisfy such judgment or any part thereof, such payment shall avail as his discharge as against both plaintiff and defendant for the amount thereof: *Cross v. Brown*, 19 R. I. 220; *Adams v. Filler*, 7 Wis. 306, 73 Am. Dec. 410. In an action against a surety, a plea that plaintiff had sued out a writ of garnishment on the judgment obtained against the principal debtor, and had recovered judgment against the garnishee for a sum which had not been credited, though paid, is a good plea of payment pro tanto: *Parks v. State Nat. Bank* (Tex. Civ. App.), 34 S. W. Rep. 1044; *Wood v. Mann*, 125 Mass. 319.

The doctrine of the principal case was enunciated early in Iowa, and has since been adhered to and followed. Thus, in *Stadler v. Parmlee*, 14 Iowa, 177, it was said that "the legal effect of a judgment against a garnishee upon his answer condemning the property or debt in his hands is to satisfy to the extent thereof the indebtedness between the garnishee and the principal debtor, and therefore the judgment entry in the garnishment suit need not in terms express such satisfaction." In this, as well as the cases which immediately follow, there is no expression of opinion that payment of the judgment against the garnishee is absolutely necessary in order to make it work a satisfaction in full or pro tanto of the principal debt. A garnishment of money due the principal debtor under a judgment against him in favor of his creditor for a much larger sum is a pro tanto defense in an action brought against the original debtor by the original creditor where the money garnished is still held under the process: *Peck v. Parchen*, 52 Iowa, 46. "The principal debtor is entitled to a credit on a judgment against him of an amount admitted by a garnishee to be due, where it does not appear that such garnishee was ever released, and the principal debtor denies having received the amount of such indebtedness, although no case was ever docketed against the garnishee and no judgment rendered, and though it does not appear that he ever paid the amount of such indebtedness to the garnishing creditor": *Doughty v. Meek*, 105 Iowa, 16, 67 Am. St. Rep. 282. The suing out of an execution against a garnishee by a creditor is in effect an election to take him for the debt of the principal debtor, and operates as an extinguishment of the debt: *Cook v. Field*, 3 Ala. 53, 36 Am. Dec. 436. If the assignee of a claim intervenes in garnishment proceedings brought by a creditor of his assignor against a guarantor of the claim assigned, and a valid judgment is rendered against such guarantor, from which no appeal is taken, the amount of such judgment must be credited to the debtor in reduction of the claim: *Coe v. Hinkley*, 109 Mich. 608. Judgment against a garnishee is prima facie a satisfaction and bar to a subsequent recovery of the same debt by any person: *Sessions v. Stevens*, 1 Fla. 233, 46 Am. Dec. 339, and extended note thereto on the effect of a judgment against a garnishee, pages 341-346. The aim of a trustee suit is to substi-

tute the creditor in the place of the debtor in respect to any sum due the latter from the trustee, and, if successful, it not only establishes a right to such substitution, but reduces the demand to judgment, so that execution may follow against the trustee for the amount due from him, or for so much of it as may be necessary to satisfy the judgment against the principal defendant: *Hicks v. Gleason*, 20 Vt. 139.

Generally, diligence in procuring satisfaction of the judgment against the garnishee is required to render it effectual as a bar to the claim or any part of it against the principal debtor: *Parks v. State Nat. Bank* (Tex. Civ. App.), 34 S. W. Rep. 1044. But a judgment debtor cannot maintain assumpsit against his creditor for neglect of the latter to issue execution against a trustee in the action, if such neglect continues for twenty years and it does not appear that issuing execution would have been of any service to the debtor, as where the trustee is at all times insolvent: *Noble v. Merrill*, 48 Me. 140. While the above cases hold that a garnishment judgment is pro tanto a prima facie satisfaction of the claim of the principal debtor, many cases hold that such judgment is not conclusive, and that nothing but an actual satisfaction of such judgment will absolve the principal debtor from liability when sued by the principal creditor. Thus, judgment against the garnishee without satisfaction does not of itself prevent the plaintiff in attachment from resorting to his original debtor for the amount of his whole claim: *Brown v. Somerville*, 8 Md. 444. Judgment against a garnishee is not a defense when sued by his original creditor, unless the judgment has been satisfied: *Cook v. Field*, 3 Ala. 53, 36 Am. Dec. 436; *Sharpe v. Wharton*, 85 Ala. 225. The fact that the garnishee admits an indebtedness to the principal defendant, and judgment is rendered against him, but not paid, does not prevent the plaintiff from suing another person on the debt so admitted, and afterward assigned by defendant to plaintiff, and showing that such other person and not the garnishee is the real debtor: *Lewis v. Robertson*, 100 Ala. 246. A judgment against the trustee, unless paid, is no discharge of the judgment against the principal debtor, though by means of the trustee suit payment by the trustee to the debtor is prevented, and by the subsequent insolvency of the trustee the debt is lost: *Noble v. Merrill*, 48 Me. 140. If judgment is obtained against a defendant in attachment, and subsequently a judgment for the whole amount is rendered in the same suit against garnishees, the latter judgment remaining unpaid does not extinguish the former: *Price v. Higgins*, 1 Litt. 274. Judgment against a garnishee, so long as it remains unsatisfied, is no bar to the creditor's recovery out of his original debtor on his judgment against him, but the garnishment judgment may be pleaded as protection against being required to pay the same debt twice: *Farmer v. Simpson*, 6 Tex. 303. And if judgment against a third person on foreign attachment is

not executed, the plaintiff may resort to his principal debtor, and he may also sue a third person for his debt: *Robertson v. Amoy*, 1 Dyer, 83a. The mere service of a garnishment under an execution is not such a levy on personal property as amounts to a satisfaction of the debt: *Beaumont v. Eason*, 12 Heisk. 417. A judgment against one as garnishee in a process of foreign attachment in one state is not a bar to an action against him in another state by the principal defendant, if the garnishee has not satisfied, and may not be compelled to satisfy, the judgment. However, such judgment may be good ground for an abatement, or a stay of the proceedings: *Meriam v. Rundlett*, 18 Pick. 511. If a creditor attaches his debtor's property in the hands of a third person, and after judgment levies an execution thereon, it applies as a payment to the creditor, and exonerates the third person from the claim of the debtor if anything is taken under the execution, but if nothing is taken thereunder, the creditor is still entitled to recover against the principal debtor for the whole amount of his debt: *Backus v. Denison*, Kirby, 421.

Although judgment against a garnishee has been paid, it does not constitute a bar or estoppel against the principal debtor, preventing him from recovering either from his creditor or the officer representing him, if such payment was made through the seizure and application of exempt property of the garnishee: *Singer Mfg. Co. v. Fleming*, 39 Neb. 679, 42 Am. St. Rep. 613; *O'Connor v. Walter*, 37 Neb. 267, 40 Am. St. Rep. 483.

FURENES v. EIDE.

[109 Iowa, 511.]

EVIDENCE—INTERESTED PARTY.—If a decedent has executed deeds intended as gifts, a witness who is interested in the property, and who took the deeds and delivered them to the grantees, is incompetent to testify to any directions or communications made by the deceased at the time that the witness received the deeds.

DEEDS—DELIVERY.—THE PRESUMPTION that a deed was delivered on the date of its execution does not prevail when the record affirmatively shows that such deed did not reach the grantee until after the grantor's death.

DEEDS—DEATH.—AGENCY TO DELIVER A DEED is dissolved by the death of the grantor unless otherwise provided.

EVIDENCE—INTERESTED PARTY.—Parties interested in the subject matter in litigation are not prohibited from testifying to facts from which inferences may be drawn, although they cannot testify directly to the facts inferred.

DEEDS—DELIVERY.—POSSESSION of a deed is *prima facie* evidence of delivery, although the deed is brought to the grantee by a person other than the grantor.

E. H. Addison, D. J. Vinge, and W. B. Harvison, for the appellants.

G. W. Dyer and Dyer & Stevens, for the appellees.

513 LADD, J. The deeds from Thor Olson to his three grandchildren were without consideration, and doubtless intended as a gift. Though nearly eighty years of age, and physically very weak, he appears to have had the full possession of his faculties, and not to have been unduly influenced in what he did. The evidence relating to his care and treatment falls far short of indicating mental incapacity or the exercise of control over him by others. We may, then, limit our inquiry to ascertaining whether the deeds were delivered; for a gift, to be effective, must be complete. They were prepared by, and acknowledged before Clousler, a justice, on Sunday, July 21, 1889, though dated as of the previous day. Where there is no delivery the gift must fail. "Intentions cannot supply it; words cannot supply it; actions cannot supply it. It is an indispensable requisite, without which the gift fails, regardless of the consequences": Thornton on Gifts, sec. 131; Otto v. Doty, 61 Iowa, 26. The evidence shows that Clousler placed the deeds on the table in the room of the deceased, after they were signed and acknowledged. John Severtson testified that Olson, after Clousler left, directed him to hand the deeds over to the grantees named therein, and that he took them for the children, and delivered them at the first opportunity. He is not certain when he gave the deed to S. C. Severtson, but his wife testified he did so Monday morning, the day before Olson's death. The deeds to Anna M. Eide and Ellen M. Mickelson did not reach them until the grantor was dead and buried. As appropriate objections were made, evidence of any directions or communications from Olson to Severtson must be excluded, as he is interested in the event of each of the three actions (Code, sec. 4604); for, should the plaintiffs succeed, he, as son of Olson's wife, with her other heirs, would take one-half of the property under the will, and he is the sole heir of S. C. Severtson.

514 The defendants insist that a deed is presumed to have been delivered as of the date it bears. But this record conclusively shows that those to Eide and Mickelson did not reach them till after the grantor's death. These, then, passed no title. Even were Severtson's evidence received, it showed him only to have been Olson's agent. He was employed to carry

the deeds to the grandchildren, not to receive them in their behalf. Nor was he to do this after their death. That such an agency is dissolved by the death of the principal has been repeatedly ruled by this court: *Darr v. Darr*, 59 Iowa, 81; *Lewis v. Kerr*, 17 Iowa, 73; *Vance v. Anderson*, 39 Iowa, 426; *Crispin v. Winkleman*, 57 Iowa, 523. See, also, *Scott v. Lau-man*, 104 Pa. St. 593; *Sessions v. Moseley*, 4 Cush. 87.

There was nothing to indicate that this agency was intended to extend after Olson's death, nor that the deeds could not have been recalled by the grantor at any moment. It is not like a case where a third party, taking the papers, may be considered to be acting for the grantee, nor where these are placed in the hands of a third person, to be delivered on the happening of some event after death, as in *Dettmer v. Behrens*, 106 Iowa, 588, 68 Am. St. Rep. 326. If these deeds, then, were delivered by Severtson, he acted without authority, and, as the grantees did not receive them until after the grantor's death, no title passed to Eide or Mickelson.

Those interested in the litigation, however, are not prohibited from testifying to facts from which inferences may be drawn: *McElhenney v. Hendricks*, 82 Iowa, 658; *Walkley v. Clarke*, 107 Iowa, 451. The testimony of Mrs. Severtson that S. C. Severtson was in possession of the deed to him before Olson's death was uncontroverted, and such possession was prima facie evidence of delivery. This was not overcome by the mere fact that it may have been brought to him by his father: *Blair v. Howell*, 68 Iowa, 622. It follows that the decree in the cases against Anna M. Eide and Ellen M. Mickelson must be reversed, and that against John Severtson affirmed.

DEEDS.—POSSESSION OF A DEED by the grantee is prima facie evidence of its delivery: *Ward v. Dougherty*, 75 Cal. 240, 7 Am. St. Rep. 151.

A DEED IS PRESUMED TO HAVE BEEN DELIVERED on the day of its date: *Lake Erie etc. R. R. Co. v. Whitham*, 155 Ill. 514, 46 Am. St. Rep. 355; *Conley v. Finn*, 171 Mass. 70, 68 Am. St. Rep. 399. See the extended note to *Brown v. Westerfield*, 53 Am. St. Rep. 537-556, on what is a delivery of a deed.

DEEDS—DELIVERY AFTER DEATH.—The death of the grantor does not prevent a valid delivery of a deed if the conditions under which it is held by a third person are complied with by the grantee: *Dettmer v. Behrens*, 106 Iowa, 585, 68 Am. St. Rep. 326.

AGENCY.—THE DEATH OF A PRINCIPAL operates as an instantaneous and absolute revocation of the agent's authority: *Cleveland v. Williams*, 29 Tex. 204, 94 Am. Dec. 274; monographic note to *Cassiday v. McKenzie*, 89 Am. Dec. 81.

SCOTTISH UNION AND NATIONAL INSURANCE COMPANY v. HERRIOTT.

[109 Iowa, 606.]

ACTIONS AGAINST STATE—WHAT ARE NOT.—An action by a foreign insurance company against the state treasurer in his official capacity to recover taxes collected by him under a statute requiring all such insurance companies to pay to the state a certain amount from the premiums received on business done in the state, as a condition of their right to do business therein, is not a suit against the state.

TAXATION—PAYMENT OF TAXES UNDER PROTEST—ACTION TO RECOVER.—If a state officer, acting under authority of a statute, receives taxes paid to him under duress and protest, an action may be maintained against him to recover the amount thus paid, provided the statute is void, although he has placed the money to the credit of the state.

CORPORATIONS, FOREIGN—RIGHT TO IMPOSE CONDITIONS—CONSTITUTIONAL LAW.—A statute requiring all foreign insurance companies to pay a tax on their business in the state, as a condition of their doing business therein, and imposing a higher tax on them than is imposed upon domestic insurers, is not a special or local law, nor is it in violation of constitutional provisions requiring that all laws of a general nature shall have a uniform operation, and that the general assembly shall not grant to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens.

CORPORATIONS, FOREIGN—RIGHT OF STATE TO EXCLUDE OR IMPOSE CONDITIONS.—A state may exclude a foreign corporation from doing business therein, and it is not prohibited from discriminating in the privileges it may grant to such corporation as a condition of its doing business within its limits.

CORPORATIONS, FOREIGN—TAX ON BUSINESS.—A statute requiring all foreign insurance companies to pay to the state a certain percentage of premiums received on business done in the state, as a condition of their doing business therein, is a tax on business, and not on property, and therefore not in violation of a constitutional provision that the property of corporations shall be subject to taxation in like manner as that of individuals.

CORPORATIONS, FOREIGN—TAX ON BUSINESS.—There is no constitutional provision, either federal or state, that taxes imposed on the business of foreign corporations, as a condition of their doing business within the state, shall be uniform. It is permissible for the state to exact a license fee, and also impose a tax on the business done.

CORPORATIONS, FOREIGN—TREATY RIGHTS.—A corporation organized in Great Britain, and having its principal place of business there, is not a subject thereof, within the meaning of a treaty giving subjects of that country the right to do business in any of the states of the United States on the same terms as natives.

McVey & McVey, for the appellant.

M. Remley, attorney general, for the state.

⁴⁰⁷ DEEMER, J. Section 1333 of the code of 1897 provides, in substance: "That every insurance company or association organized or incorporated under the laws of any state or nation other than the United States shall, at the time of making its annual statement, as required by law, pay into the state treasury, as taxes, three and one-half per cent of the gross amount of premiums received by it for business done in this state during the preceding year. And that every insurance company incorporated under the laws of any state of the United States, other than the state of ⁴⁰⁸ Iowa, shall pay a tax of two and one-half per cent of the gross amount of premiums received by it for business done in this state during the preceding year. And that every other insurance company shall pay a tax of one per cent of its gross premiums received after deducting the amount actually paid for losses and the amount of premiums returned during the preceding year. And that said companies shall take duplicate receipts therefor, one of which shall be filed with the auditor of state, and upon the filing of said receipt, and not till then, the auditor shall issue the annual certificate provided by law." No such law was in existence prior to the meeting of the extra session of the general assembly which passed that code. Plaintiff is a corporation organized and doing business under the laws of the kingdom of Great Britain. Its stock is held by citizens and residents of that country, and at the time of the passage of the act in question it had a general office at Hartford, in the state of Connecticut, and was, and had for twenty years prior thereto been, doing business in the state of Iowa, having complied with all the laws permitting it to do business in this state. Plaintiff failed to make payment of the tax imposed by this act at the time it filed its annual statement, and in January of the year 1898 the auditor of state notified it of its delinquency, calling attention to the provisions of the act, and requiring payment of the amount imposed on or before January 31, 1898. He also notified it that, if the amount was not paid within the time mentioned, action would be taken for the collection of the tax by distress or suit, and that the company would be precluded from doing business in the state after the date named. On the last day of that month, plaintiff paid the amount of the tax to the treasurer under protest, taking his receipt therefor, and received authority from the auditor to do business in the state for the year 1898. This action is to recover the tax so paid.

Some preliminary questions are to be disposed of before resorting to the merits. While error is assigned on ⁶⁰⁰ the ruling dismissing the defendant in his individual capacity from the case, appellant does not argue the assignment in its original brief, and hence it will be deemed waived. It is insisted that the action against the state treasurer is practically an action against the state, and that, under familiar principles, it cannot be maintained. In *re Tyler*, 149 U. S. 164, seems to establish the rule by which to determine this question. There we find this language: "Where a suit is brought against defendants who claim to act as officers of a state, and under color of an unconstitutional statute commit acts of wrong and injury to the property of plaintiff, to recover money or property in their hands unlawfully taken by them in behalf of the state, or for compensation for damages, or in a proper case for an injunction to prevent such wrong or injury, or for a mandamus in a like case to enforce the performance of a plain, legal duty, purely ministerial, such suit is not, within the meaning of the amendment, an action against the state." Again, in the *Virginia Coupon Case*, 114 U. S. 288, that court held, in effect, that when a defendant, sued as a wrongdoer, seeks to justify by the authority of the state, he is bound to establish that the law under which he assumes to act is a valid law; that, if the law under which he justified is unconstitutional, it is, in effect, no law, and that he then stands stripped of his official character, and must answer personally for the invasion of plaintiff's rights. In *Smyth v. Ames*, 169 U. S. 466, we also find this pertinent language: "Within the meaning of the eleventh amendment of the constitution, the suits are not against the state, but against certain individuals charged with the administration of a state enactment, which, it is alleged, cannot be enforced without violating the constitutional rights of the plaintiffs. It is the settled doctrine of this court that a suit against ⁶¹⁰ individuals for the purpose of preventing them, as officers of a state, from enforcing an unconstitutional enactment, to the injury of the rights of the plaintiff, is not a suit against the state, within the meaning of the amendment": *Pennoyer v. McConnaughy*, 140 U. S. 1, 10; In *re Tyler*, 149 U. S. 164, 190; *Scott v. Donald*, 165 U. S. 58, 68; *Tindal v. Wesley*, 167 U. S. 204, 220. See, also, In *re Ayers*, 123 U. S. 443. Much more might be quoted from the cases already cited in support of the rule thus so clearly announced. The attorney general contends that no wrong is charged upon the treasurer. The record discloses, however, that the money was paid under

threats from the auditor that he would enforce the collection of the tax, and revoke plaintiff's permission to do business in the state; and that it notified the treasurer, when it paid the money, that it did so under duress, and protested against paying the same; and that Herriott, as treasurer, collected and received said taxes without authority of law. True, there is no statement that defendant did any wrong other than to collect and receive the money, but it is averred that he had no authority of law either to collect or receive the same, and that he had notice and knowledge that plaintiff was paying the same under duress, and that the payment was not voluntary. If defendant were an individual receiving money obtained with his knowledge, through duress, and paid under protest, there would be no doubt of plaintiff's right to recover it back. The mere fact that he is the treasurer of state, acting under authority of law, will not relieve him if it should turn out that the law is unconstitutional, and therefore no law. We think an action will lie against the treasurer for money collected and received by him, provided it be established that the law under which he assumes to act is entirely invalid. That he may have placed the money ⁶¹¹ to the credit of the state, and with other funds belonging to it, is no defense, unless he was authorized to do so under a valid law. Had he collected money wrongfully from an individual, without color of authority, we apprehend it would be no defense for him to say that he acted as treasurer, or that he had turned the money over to the state. Again, it is said that the money was paid voluntarily, and cannot be recovered back. The petition recites, in substance, that plaintiff had large property interests in the state, which it was in duty bound to preserve and protect, and that the letter from the auditor of state made it impossible for plaintiff to continue its business, or to protect its property, without paying the tax. At the time of the payment, plaintiff filed with both the treasurer and the auditor a written protest, in which it claimed that the tax was unconstitutional and invalid, and that by so paying it did not acknowledge its liability to pay the tax, or waive any of its right to contest the same. Plaintiff was bound to submit to the exaction or discontinue its business. Under such a state of facts it is clear that plaintiff's act was not voluntary, and that it may recover back the amount paid, provided it has established its claim that the act in question is unconstitutional: *Swift Co. v. United States*, 111 U. S. 23; *Cunningham v. Munroe*, 15 Gray, 471; *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287;

Beckwith v. Frisbie, 32 Vt. 559; Shelton v. Platt, 139 U. S. 594; and cases cited in State v. Nelson, 41 Minn. 25.

2. This brings us to the merits of the controversy. Does the act in question violate the constitution of this state, which requires that all laws of a general nature shall have uniform operation, and that the general assembly shall not grant to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens; that the general assembly shall not pass local or special laws for the collection of ⁶¹² taxes, nor in any case where a general law can be made applicable; that the property of all corporations for pecuniary profit shall be subject to taxation the same as that of individuals? Does it conflict with the provisions of the federal constitution to the effect that no state shall abridge the privileges or immunities of citizens of the United States, nor deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws? Does it violate the civil rights act, found in the Revised Statutes as section 1977, providing that all persons within the jurisdiction of the United States shall have the same right to the full and equal protection of the laws for the security of property as is enjoyed by white persons, and be subject to like punishments, pains, penalties, taxes, and licenses, and exactions of every kind, and no other? Is it in contravention of the treaties between this country and Great Britain, which, by article 6 of the constitution, are made the supreme law of the land? These are the pivotal questions in the case, and to them we now turn our attention. Under the decisions heretofore rendered by this court it is clear that this statute has uniform operation. It applies alike to all belonging to any of the classes designated, and is uniform, not because it operates upon every person or corporation in the state, but because every person or corporation brought within the relations and circumstances provided for is affected by the law: *McAunich v. Mississippi etc. R. R. Co.*, 20 Iowa, 338; *United States Exp. Co. v. Ellyson*, 28 Iowa, 370; *Warren v. Henly*, 31 Iowa, 31; *Central Iowa Ry. Co. v. Board of Supervisors*, 67 Iowa, 199; *Primghar State Bank v. Rerick*, 96 Iowa, 238; *Chicago etc. Ry. Co. v. Iowa*, 94 U. S. 155; *Owen v. Sioux City*, 91 Iowa, 190. This rule has been applied to classifications for the purposes of taxation: See cases cited above. The clause of the state constitution prohibiting the grant of privileges or immunities to any citizen or class ⁶¹³ of citizens not granted

to others has reference to citizens or classes of citizens residing in the state, for it is uniformly held that a foreign corporation has no absolute right of recognition in other states, that it depends for its recognition and the enforcement of its contracts upon their assent, and a state is not prohibited from discriminating in the privileges it may grant to foreign corporations as a condition of their doing business within its limits: *Philadelphia Fire Assn. v. New York*, 119 U. S. 110; *Paul v. Virginia*, 8 Wall. 168; *Pembina etc. Milling Co. v. Pennsylvania*, 125 U. S. 181. For reasons already given, the law is not local or special, and its operation is uniform throughout the state. Whether the act is in contravention of the article of the constitution providing that the property of all corporations for pecuniary profit shall be subject to taxation the same as that of individuals depends upon whether the tax in question is a tax on property, a tax upon a business or privilege, or a license tax or condition imposed as a prerequisite to the right of foreign corporations to do business in the state. We are willing to concede that, if the tax imposed by the act is simply a tax on property, it is vulnerable to the constitutional provision just referred to, and, perhaps, interdicted by other provisions of both state and federal constitutions. But if it is a tax on business, or on the privilege of doing business in the state, or if it is simply a condition imposed by the state as a prerequisite to the right of the corporation to do business in the state, then it is not vulnerable to any constitutional provision. There is no requirement of either the federal or state constitution that taxes on business or on privileges shall be uniform: *Pembina etc. Milling Co. v. Pennsylvania*, 125 U. S. 181. It is permissible for a state to exact a license fee, and also impose a tax on the business done: *Cooley on Taxation*, 1st ed., 385, 386; *People v. State Treasurer*, 31 Mich. 614 6; *People v. Thurber*, 13 Ill. 554. Again, one who pays taxes on his stock in trade as property may also be subject to a tax on his occupation or business. It is no objection to either of these taxes that the corporation was already doing business in the state when the act imposing them went into effect. In *Doyle v. Continental Ins. Co.*, 94 U. S. 535, it is held that a state has the right to revoke or recall a permission already granted, and that a license to a foreign corporation to enter a state does not involve a permanent right to remain. No other authorities need be cited to sustain the proposition that there is no constitutional objection to imposing a tax on business, although that business may have been freely

conducted before the adoption of the revenue measure. What, then, is the nature of the tax in question? The act requires of insurance companies the payment into the state treasury of a certain percentage of the gross amount of premiums received by them for business done in the state, and further provides that the auditor shall not issue a certificate to do business until these taxes are paid. This, it seems to us, partakes both of the nature of a tax on business and of a license tax or condition required of corporations to enable them to continue in business in the state. Appellant's counsel rely on *United States Exp. Co. v. Ellyson*, 28 Iowa, 370, as an authority for the proposition that the tax is a tax on property. We do not so regard it. The act there construed provided in express terms that the tax was a property tax, and should be assessed at the same rate as other personal property in the state. The income of the corporation was considered for the purpose of arriving at the value of their personal property, and for no other purpose. In the language of the opinion in that case it is said: "It simply prescribes the method whereby the amount of taxable personal property or moneys and credits of express and telegraph companies shall be ascertained; and this amount is made subject to taxation the same as the personal property or money and credits of individuals." The tax, when ⁶¹⁵ thus levied and assessed, was to be collected in the same manner as that levied upon the property of individuals. There are no such provisions in the act under consideration. By the terms of that act the company is required to pay a certain percentage of its gross income directly into the state treasury. No method is provided for the collection of the tax, and the only penalty for nonpayment is revocation of authority to do business. Whether an ordinary action at law would lie to recover the tax we need not determine, for that is not essential to the solution of the question as to the character of the tax. It is clearly a tax on business, and not a tax on property, and the payment of the tax is necessary to enable the corporation to continue in that business. There is no restriction on the power of the legislature to tax occupations. It may, therefore, tax one, or it may tax all. Judge Cooley, in his work on *Taxation*, first edition, page 384, said that the methods in which business may be taxed are in the legislative discretion and that the customary ones were: "1. On the privilege of carrying on business; 2. On the amount of the business done; 3. On the gross profits of the business; and 4. On the net profits, or profits divided." The tax imposed by section

1333 of the code partakes of the nature of the first two of these methods. Counsel for appellant, in one division of his argument, concedes that the tax is not a tax on property, and insists that it is a tax on the premium income of the company. Fortified by this admission, we think we are safe in saying that this is not a tax on property, but on business done within the state. Plaintiff contends, however, that if it be conceded that this is a tax on business, yet such tax must be uniform upon all who are engaged in that business. If foreign corporations had the absolute right to engage in business in this state, there would be much force in the suggestion, but, as we have seen, they have no such right, as they can only do business in this jurisdiction with the assent of the state, and this assent ³¹⁶ may be granted only upon compliance with certain expressed conditions. In *Ex parte Cohn*, 13 Nev. 424, it is expressly held that such a tax as the one here imposed is a tax on the business of insurance companies, and that the legislature may impose a higher rate upon foreign corporations than it does upon corporations organized under the laws of that state; and that such tax was a condition precedent to the right to do business within the limits of that state, and not an *ad valorem* tax on property: See, also, *State v. Lathrop*, 10 La. Ann. 398; *Phoenix Ins. Co. v. Welch*, 29 Kan. 672; *State v. Insurance Co. of North America*, 115 Ind. 259. The constitutional difference between the rights of nonresident individuals and of foreign corporations is fundamental. The individual has a constitutional right to come within our jurisdiction, and to transact any lawful business therein. But foreign corporations have no such right. We may exclude them absolutely, or impose conditions upon their coming, and, having come, we may revoke the permission, unless they comply with the conditions imposed: *Pembina etc. Milling Co. v. Pennsylvania*, 125 U. S. 181; *Horn Silver Min. Co. v. New York*, 143 U. S. 305; *People v. Roberts*, 171 U. S. 658.

We have already observed that the state is not prohibited from discriminating in the privileges it may grant to foreign corporations. In *Pembina etc. Milling Co. v. Pennsylvania*, 125 U. S. 181, it is expressly held that the term "person," as used in the fourteenth amendment to the constitution, does not include foreign corporations. This significant language is used at the close of that opinion: "The only limitation upon this power of the state to exclude a foreign corporation from doing business within its limits, or to exact conditions for allowing

the corporation to do business, arises where the corporation is in the employ of the federal government, or where its business is strictly ^{and} commerce, interstate or foreign. The control of such commerce, being in the federal government, is not to be restricted by state authority." When it is once conceded that a state has the right to impose conditions upon the right of foreign corporations to do business within its limits, it follows that it may divide such corporations into classes, and may impose conditions on one not imposed upon the other. Such a result necessarily follows from its right to impose conditions, and there is no constitutional reason for saying that home and foreign corporations should be treated exactly alike. The clause of our constitution requiring that the property of all corporations for pecuniary profit shall be subject to taxation the same as that of individuals has no application to the case. It is not the property of the corporation that is taxed.

Our attention has not been called to any treaty with Great Britain that is violated by the act in question. True, the petition states in general terms that there is a treaty which gives to the subjects of Great Britain the right to reside in and do business in any of the states on the same terms and conditions as natives; that they shall be subject to the same rules, regulations, and taxes, and pay no higher or other taxes or imposts than those which may be levied on citizens and subjects of this state. In the absence of reference to any such treaty, we are not called upon to decide the question presented. If there be no more to the instrument than is charged, it is clear that it has no reference to the facts of this case. Plaintiff is not a subject of Great Britain. It is a corporation having its principal place of business in that country, but this does not make it a subject thereof. It may, under certain circumstances, be said to be a citizen, but it cannot, generally speaking, be a subject.

We have now considered all the objections lodged against the act, and, finding none of them tenable, the conclusion follows that the trial court was right in denying the relief asked, and its judgment is affirmed.

STATES.—THE RULE WHICH FORBIDS SUIT against state officers, because it is in effect a suit against the state, applies only when the interest of the state is, through some property right or contract of hers, involved, or when her interest is in a suit brought or threatened by her officers in her own name to enforce some alleged claim of hers: *McWhorter v. Pensacola etc. R. R. Co.*, 24 Fla. 417, 12 Am. St. Rep. 220. See, too, *Herr v.*

Central Kentucky Lunatic Asylum, 97 Ky. 458, 53 Am. St. Rep. 414.

TAXES—RECOVERING BACK.—An illegal tax paid under duress may be recovered back: Note to *Whitney v. Port Huron*, 26 Am. St. Rep. 295. See further on this subject the extended notes to *Detroit v. Martin*, 22 Am. Rep. 519-521; *Baltimore v. Lefferman*, 45 Am. Dec. 164, 165.

TAXES—FOREIGN CORPORATIONS.—A state tax upon the gross receipts of a foreign building and loan association is a tax upon the franchise of the corporation and not a tax upon its property: *Southern etc. Assn. v. Norman*, 98 Ky. 294, 56 Am. St. Rep. 367. A statute requiring corporations to pay an "annual privilege tax graduated by the paid-up capital stock," imposes a privilege or franchise tax, as distinguished from a property tax, and is not offensive to those constitutional provisions which require equality and uniformity in the taxation of property: *Phoenix Carpet Co. v. State*, 118 Ala. 143, 72 Am. St. Rep. 143. A state may impose upon corporations of other states a tax for the privilege of carrying on their business within it, although no equivalent burden is imposed upon domestic corporations: Note to *Southern etc. Assn. v. Norman*, 56 Am. St. Rep. 374.

CORPORATIONS, FOREIGN.—STATE LAWS REGULATING foreign insurance companies and prescribing rules by which they may do business within the state, or prohibiting them from doing so altogether, do not contravene any provision of either the state or the federal constitution: *Cravens v. New York Life Ins. Co.*, 148 Mo. 583, 71 Am. St. Rep. 623.

PURCELL v. CHICAGO & NORTHWESTERN RAILWAY COMPANY.

[109 Iowa, 629.]

RAILROADS—LIABILITY FOR DEATH OF TRESPASSER. A railroad company is liable for the death of a trespasser on its track, run over by a train, if its engineer could have stopped it in time to avoid the killing, had its fireman promptly notified such engineer of the danger after discovering the trespasser upon the track.

RAILROADS—LIABILITY FOR DEATH OF TRESPASSER. The fact that a trespasser on a railroad track might have jumped to the ground, a distance of over eight feet, or that he might have laid down on the ties, to avoid being run over by an approaching train, does not relieve the railroad company from liability for killing him, if its employees neglected to exercise reasonable care for his safety after discovering him upon the track.

EVIDENCE—RES GESTAE.—DECLARATIONS made five and one-half hours after the happening of an accident are not admissible as part of the res gestae.

S. H. Cochran, for the appellant.

Hubbard, Dawley & Wheeler, for the appellee.

LADD, J. The deceased, Z. W. Hunt, on the day he was killed, was walking on the defendant's track, toward the east, and when on a bridge some eight feet high was struck by a fast passenger train known as the "Overland Limited," going west. It appears without dispute that when he was first seen by the engineer the train was a mile away, the track being straight for that distance. At that time he was walking on the track west of the bridge, but, before reaching it, stepped to the south side of the track. The engineer's attention from then on was taken by the semaphore at Missouri Valley, and he saw no more of him. But the fireman testified: "When I first saw Mr. Hunt, he was on the south side of the track, about eight or ten feet of the trestle. When I saw him he was walking on the left side toward the train, and he got up on the bridge, and kept walking on the bridge until we hit him. He leaned over the bridge with his face toward us. When I first saw Mr. Hunt, I think the engine was three or four car-lengths from him." Both the engineer and fireman estimate the speed of the train at forty or more miles an hour. The bridge was seventy-eight feet in length. One Athy testified that he was standing at a farmhouse, about a half mile distant; saw the accident; and that Hunt was three-fourths of the way across the bridge, within fifteen or twenty feet of the east end, when struck. This was the only witness fixing the point on the bridge where the deceased was standing at the time. That the defendant owed the deceased no active duty before he was seen on the bridge must be conceded. It could not have been reasonably anticipated that he would go on the bridge in front of an approaching train, until he did so, or indicated in some way such an intention: See *Thomas v. Chicago etc. Ry. Co.*, 93 Iowa, 248; *Burg v. Chicago etc. Ry. Co.*, 90 Iowa, 106. But if Athy is to be believed, he must have walked ⁶³⁰ sixty feet on the bridge, toward the train, after the fireman had observed him in a place of peril. Conceding the train to have been moving at the rate mentioned by the employes—though Athy put the speed much lower—the engine was between six hundred and eight hundred feet from the deceased when the fireman first saw him go on the bridge. If moving but thirty miles an hour, as stated by Athy, it could not have been that far off. True, the fireman estimates the distance at three or four car-lengths. But he saw him until the time he was struck, and the jury might have found that to be at the point testified to by Athy. The question, then, arises, Could the train have been stopped in

time to have avoided the accident? A witness who had at one time been an engineer testified that such a train as the one in question might be stopped, when moving at the speed of forty miles an hour, within one hundred yards. This evidence was undisputed. He also gave estimates of distances within which it might be brought to a standstill when moving slower. Whether this evidence is credible cannot be considered in the absence of any controversy concerning it. The appellant makes no claim but that it must be taken as true for the purposes of this case. Had the fireman warned the engineer of Hunt's dangerous situation instantly when he observed him going on the bridge, and the engineer employed every means, consistently with safety, to stop the train, the injury might have been averted. At least the jury might have so concluded from the evidence as it stood when the verdict was directed.

2. It is suggested that the deceased should have jumped from the bridge, or else laid down on the ties. He was sixty-five years old, and it would certainly have been hazardous to have leaped a distance of eight feet to the ice or frozen ground below. It must be said that he was negligent in going on the bridge and in being where he was. He might and ought to have done differently. But this did not excuse the defendant if its employes observed him heedlessly walk out on the trestle-work, ⁶³¹ apparently oblivious of the peril of being run down by the approaching train, and if, by the exercise of ordinary care on their part in the application and use of every available means for the protection of life, the injury could have been averted. They were not permitted to speculate whether he would jump from the bridge, or lie down, or in some other manner get out of harm's way a moment after it became evident that he was insensible of the impending danger, or incapable of providing for his safety. The moment he went on the bridge, his peril was manifest and imminent—a warning that he was taking no heed for his own safety—and the defendant's employes, having this knowledge, were required to exercise reasonable care to avoid a collision. Whether they did so, under the circumstances disclosed, was for the jury to say: See *Central R. R. Co. v. Vaughan*, 93 Ala. 209, 30 Am. St. Rep. 50; *Clark v. Wilmington etc. R. R. Co.*, 109 N. C. 430; *Peirce v. Walters*, 164 Ill. 560; *Sutzin v. Chicago etc. Ry. Co.*, 95 Iowa, 304; *Romick v. Chicago etc. Ry. Co.*, 62 Iowa, 167; *Kansas Pac. Ry. Co. v. Whipple*, 39 Kan. 531; *Elliott*

on Railroads, sec. 1287; Shearman and Redfield on Negligence, secs. 99, 100.

3. On the trial a witness was asked what he heard the engineer say at the coroner's inquest, five and one-half hours after the accident, with reference to having seen Hunt, and the distance he was from him at that time. This was not calling for a part of the transaction, but for an account of it at another time and place, and for this reason was not a part of the *res gestae*.

Reversed.

RAILROADS—TRESPASSERS ON TRACK.—When a trespasser injured upon a railroad track has been guilty of contributory negligence, the company is liable if, by the exercise of ordinary care, it could have prevented the accident after discovering the danger in which the injured party stood: *Lake Shore etc. Ry. Co. v. Bodemer*, 139 Ill. 596, 32 Am. St. Rep. 218. So if a person is placed in a position of danger from an approaching locomotive through his own negligence, but the engineer in charge becomes aware of the danger in time to avoid the injury by the exercise of ordinary care, and through his failure to exercise it the person so imperiled is injured, he is entitled to recover therefor: *Kansas etc. Ry. Co. v. Fitzhugh*, 61 Ark. 341, 54 Am. St. Rep. 211. See, further, the note to *Central etc. R. R. Co. v. Vaughan*, 30 Am. St. Rep. 53-55, on the duty of railroads to trespassers on the track.

RES GESTAE.—Statements made several hours after an accident form no part of the *res gestae*: *Globe Accident Ins. Co. v. Gerlisch*, 163 Ill. 625, 54 Am. St. Rep. 486.

STATE v. HASKINS.

[109 Iowa, 656.]

LIBEL—CRIMINAL—PRIVILEGED COMMUNICATION.—The publication of charges against a candidate for office outside of the district for which he may be elected is not privileged, and, on a criminal prosecution for the publication of such libel, the accused's belief in its truth is no defense.

LIBEL—CRIMINAL—PRIVILEGE—BELIEF IN TRUTH OF CHARGE AS DEFENSE.—In a criminal prosecution for the publication of libelous matter shielded by no privilege, the defendant cannot exonerate himself by showing a belief on his part in the truth of the charge.

CRIMINAL LAW—EVIDENCE—PROOF OF RECORDS.—The accused in a criminal case is not prejudiced by the introduction of the original records to prove an admissible fact merely because such proof should have been made by certified copy.

EVIDENCE—STATEMENT OF FACT OR CONCLUSION.—Proof of who was acting as a certain county officer at a certain

time may be made by the statement of a witness, without producing such officer's commission of office. Such statement by the witness is of a fact and not a conclusion.

T. H. Chapman, for the appellant.

M. Remley, attorney general, and Carr & Parker, for the state.

556 WATERMAN, J. Defendant is the editor and publisher of a newspaper printed in the county of Buena Vista, one of the counties composing the fourteenth judicial district of 557 this state. The article upon which this prosecution is founded was written by one Bruce, and published by defendant in his paper, at a time when one F. H. Helsell was a candidate for the office of judge of the district court in and for said district. The article charged Helsell with fraudulently altering a public record. No claim is here made that the charge was true. It is, however, insisted by defendant that if he published the article in good faith, believing it to be true and actuated by justifiable motives, he cannot properly be convicted. A determination of the question thus presented will dispose of several of the assignments of error.

In order to make plain our reasons for the conclusion at which we have arrived, it will be necessary to consider, to some extent, the common law relating to this subject. First, let us say there have always been some material distinctions preserved between civil actions, in which damages were sought for this offense, and criminal proceedings. In a criminal proceeding at common law, the defenses were but two—a denial and a plea of privileged communication. The truth of the matter charged could not be given in evidence by a defendant. It was a maxim that “the greater the truth the greater the libel.” A prosecution for this offense was founded on the thought that a publication of a libel was likely to provoke a breach of the peace, and the fact that it was true tended rather to increase the probabilities of such a result: 1 Kent's Commentaries, 621. But, in a private action for pecuniary recompense, the truth of the charge could always be shown in justification, or in mitigation of damages, since, as it is said, a man is entitled to no better reputation than his actual character would warrant: 1 Greenleaf on Evidence, sec. 421; J'Anson v. Stuart, 1 Term Rep. 748; 2 Smith Lead. Cas. 986, note. In course of time, the rule was adopted in many of the states of the Union allowing the truth of the charge to be shown as

a defense. In our own state this principle is embodied in the constitution: Const., art. 1, sec. 7. But with us it is qualified. The truth can be shown only when the publication ⁶⁵⁸ is made "with good motives and for justifiable ends." Except as thus modified, the common law relating to libel governs in this state. Without the constitutional provision mentioned, the truth itself would be no defense. There is no little uncertainty in the books on the question of what constitutes a privileged communication, or rather what publications are protected as such. There are cases which hold that a charge of crime made against one who is a candidate for public office may be the subject of privilege: *Briggs v. Garrett*, 111 Pa. St. 404, 56 Am. Rep. 274. The contrary is held by many courts of high standing: See *Bronson v. Bruce*, 59 Mich. 467, 60 Am. Rep. 307, and cases cited. We need not determine between these conflicting authorities for reasons which will presently appear. An absolute privilege is a complete defense. No legal complaint can be founded upon words spoken or written under its protection. Of this nature are proceedings in legislative assemblies, and generally in judicial tribunals. A qualified privilege is where the communication is made in the discharge of some duty, social, legal, or moral. Such a defense may be rebutted by a showing of actual malice. To establish a qualified privilege, it must be shown that defendant believed the charge to be true, and published it in the discharge of some duty, and we may assume that it was a duty on his part to make known to the electors of the fourteenth judicial district the true character of a candidate for the office of district judge. But, if this duty was in any way transcended, the good faith of defendant ceased to be material. Evidence of good faith is admissible, not as a defense in itself, but only as an element going to make up the defense of qualified privilege. It appeared in this case, from defendant's own testimony, that he voluntarily published the charge, not only outside the fourteenth judicial district, but outside the state; thus making it known to persons who were in no way interested in the judicial election. We have been cited to no case, and know of no principle of law, that would sustain ⁶⁵⁹ the claim of privilege under these circumstances. In *Buckstaff v. Hicks*, 94 Wis. 34, 59 Am. St. Rep. 853, on a state of facts quite similar to those here involved, the court said: "The evidence showed that the newspaper in question circulated in adjoining counties and cities outside of the county of Winnebago, and outside of the

plaintiff's senatorial district. To claim that there was any duty, public or private, resting on the defendant to publish such a charge against the plaintiff in these localities is to demonstrate the absurdity of the claim. There was not only no duty, but there was certainly no tangible interest in the subject matter on the part of the people outside plaintiff's district. Thus, it is very plainly seen that the publication, even if it could be considered as privileged when made to a citizen of Oshkosh, who might be said to be interested in the subject matter, could not be made broadcast to the world, and preserve its privileged character. The publication is excessive. It must be confined to people to whom defendant owes a duty to speak, or who have an interest with defendant in the subject matter": See, also, *Rude v. Nass*, 79 Wis. 321, 24 Am. St. Rep. 717.

We have, then, this question, somewhat narrower than discussed by appellant's counsel, presented: Where the publication of libelous matter is shielded by no privilege, can a defendant in a criminal proceeding exonerate himself by showing a belief on his part in the truth of the charge? We know of no authority in support of the affirmative of this proposition. In all the cases where evidence of the good faith of the defendant has been admitted, it was not as a direct defense, but only as tending to establish one essential element of a qualified privilege. *Mott v. Dawson*, 46 Iowa, 533, *Bays v. Hunt*, 60 Iowa, 251, and *State v. Conable*, 81 Iowa, 60, relied on by defendant, go no further than this. For the reasons stated, we think the evidence of defendant's good faith was inadmissible. What we have said sufficiently indicates, also, our reasons for holding that the court properly refused the instructions asked by defendant. The charge ⁶⁶⁰ as given we regard as a concise, clear, and correct exposition of the law governing the case. We think, too, that the ground has already been stated upon which we sustain the trial court's action in striking out the testimony upon which rulings were reserved, and which is discussed in the third division of the argument for defendant, and also the matter complained of in the fifth division thereof. The various questions there raised rest upon defendant's right to show his good faith as a defense.

2. An original book of records from Pocahontas county was introduced in evidence on a certain point. It is claimed there was no authority for bringing an original record from another county—that the proof should have been made by certified copy. If defendant's position is correct, we can see no

just ground of complaint on his part. He certainly suffered no prejudice.

3. A witness was allowed to say what person was county auditor at a certain time. It is argued that this was a conclusion and inadmissible. All that was sought was to show who was acting as county auditor. This could be done without producing his commission: 1 Greenleaf on Evidence, sec. 83. What the witness stated was a fact, and not a conclusion. No other matters not covered by what we have already said are presented. Some question is made by appellee as to the sufficiency of the exceptions to raise some of the matters passed upon. We have not investigated this claim, but, for reasons that seemed to us sufficient, have passed upon the merits of the case presented.

Affirmed.

Robinson, C. J., taking no part.

Granger, J., not sitting.

LIBEL OF CANDIDATE FOR OFFICE.—An attack upon a candidate for office, if otherwise privileged, must not be given a wider publicity than is necessary to accomplish the purpose which the publisher professes to seek. There can be no justification of a false and defamatory publication in the press which must reach a large number of persons who have no share in filling the office for which the person libeled is an aspirant: See the extended note to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 356, on newspaper libel.

LIBEL, CRIMINAL—BELIEF IN TRUTH OF CHARGE.—A newspaper publisher may justify or excuse libelous publications alleging maladministration of public affairs, or misconduct of public servants, in a criminal prosecution therefor, by showing that the facts alleged are true, or that he had probable cause to believe and did believe them true, and that he published them in good faith to induce reform; but if his motive was not a justifiable one, the truth of the facts alleged will not constitute a defense: *Palmer v. Concord*, 48 N. H. 211, 97 Am. Dec. 605. Compare *Commonwealth v. Blanding*, 3 Pick. 304, 15 Am. Dec. 214; *Commonwealth v. Clap*, 4 Mass. 163, 3 Am. Dec. 212.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

FOSTER v. ROW.

[120 Michigan, 1.]

CORPORATIONS—INSOLVENCY—LIABILITY OF STOCKHOLDERS.—Upon a showing by the receiver of an insolvent bank that its assets are not sufficient to pay its depositors, the circuit court has jurisdiction to ascertain ex parte the amount required to meet the deficiency, and to direct that proceedings be instituted to enforce the statutory liability of the stockholders.

CORPORATIONS—INSOLVENCY—LIABILITY OF STOCKHOLDERS.—The liability of stockholders in an insolvent bank for the benefit of depositors is not a merely collateral undertaking nor penal in its nature, but is contractual and immediately enforceable, not exceeding the par value of the stock, when it is shown that the assets are insufficient to pay the depositors.

CORPORATIONS—LIABILITY OF STOCKHOLDERS.—A constitutional provision making the stockholders of every banking corporation issuing bank-notes individually liable for all debts of the corporation to the amount of their respective shares is confined to banks of issue, and does not limit the power of the legislature to fix the liability of stockholders in banks not of issue.

CORPORATIONS—INSOLVENCY—LIABILITY OF STOCKHOLDERS.—Under a statute making the stockholders in a bank, upon its insolvency, individually liable, for the benefit of the depositors, to the amount of their stock at the par value thereof, the stockholders thus liable are those who are such when the bank becomes insolvent, without reference to the time when the deposits were actually made.

CORPORATIONS—INSOLVENCY—LIABILITY OF STOCKHOLDERS.—If a banking corporation has become insolvent, and an action has been commenced to enforce the statutory liability of stockholders, one who has, up to that time, allowed his name to appear as a stockholder cannot avoid liability on the ground that his subscription was obtained by fraud.

CORPORATIONS—INSOLVENCY—LIABILITY OF STOCKHOLDERS.—If a purchaser of bank stock could, at any time, have compelled a transfer to him upon the books of the bank, he is a

stockholder therein, and upon the insolvency of the bank he cannot escape his statutory liability on the ground that the stock has not been transferred to him on the books of the bank.

CORPORATIONS—LIABILITY OF STOCKHOLDERS—WHEN CEASES.—A person who holds stock in a bank ceases to be a stockholder or liable as such when he sells and delivers his stock duly assigned to the cashier of the bank, although the cashier never pays the bank therefor or registers the stock to himself.

CORPORATIONS—INSOLVENCY—TRANSFER OF STOCK—LIABILITY OF STOCKHOLDER—BURDEN OF PROOF.—Although a stockholder in a bank transfers his stock when the bank is in a failing condition, he cannot after its insolvency be held liable, in the absence of proof of bad faith and that he knew of the failing condition of the bank, and the burden of proof is on the receiver thereof to show such knowledge on the part of the stockholder, and that the transfer was made for the fraudulent purpose of avoiding a stockholder's liability.

CORPORATION—INSOLVENCY—TRANSFER OF STOCK TO NONRESIDENT.—A person who owns stock in a bank which is in a failing condition may in good faith validly transfer it to a nonresident.

CORPORATIONS—INSOLVENCY—TRANSFER OF STOCK. A stockholder in a going corporation may make a bona fide gift and transfer of his stock, and after such transfer is duly registered and the corporation becomes insolvent, the donor cannot be held liable on the stock unless he knew of the insolvency at the time of making the transfer.

S. H. Row, M. D. Chatterton, and W. A. Fraser, in propria persona, B. Wiley, and E. C. Chapin, for the appellants.

R. C. Ostrander, for the appellee.

* **LONG, J.** Complainant is receiver of the People's Savings Bank. The defendants, it is claimed, are stockholders in that bank. This suit, by bill in equity, is brought to enforce the statutory liability of stockholders for the benefit of the depositors of the bank. The suit was commenced against all the resident stockholders, and a decree entered against them in the court below. Only the six defendants here have appealed, and each relies upon some special defense not common to the whole body of stockholders. There are some questions raised, however, which go to the jurisdiction, and in which all the defendants have a common interest.

It appears that the bank was organized June 29, 1885, ⁴ with a capital stock of \$25,000, and was permitted by its articles of incorporation to do a savings business only. On July 5, 1889, amended articles were filed, adding a new clause, stating the bank to be both a commercial and a savings bank. On January 23, 1892, the stockholders voted to increase the capital stock to \$150,000. The bank failed and ceased to do busi-

ness on July 11, 1896. The reasons for such failure need not be set up here. The receiver took possession on July 15, 1896. He found on hand in the bank in cash \$2,915.95. There was a balance at the Chase National Bank, New York, of \$1,343.82. Excepting these two items, the bank had no cash. The total assets of the bank up to the time of the hearing of this case in the court below were \$394,050.65, as shown by the books of the bank, of which the receiver estimates (and his estimate is not disputed) \$184,536.45 worthless and \$88,305.04 doubtful, leaving \$121,209.16 of good assets, which is about the amount of collateral pledged by the bank to secure the persons from whom it had borrowed money. He found the total liabilities of the bank, as shown from the books, exclusive of capital stock, to be \$249,140.63, showing a deficit over liabilities and capital stock, after taking out all the good and one-half of the doubtful assets, of over \$230,000. The claim of the receiver is that, having ascertained to his satisfaction that after exhausting all the assets of the bank the depositors would not be fully paid, and having also ascertained the amount of the deficiency, it was his duty to apply to the court by petition for an order judicially determining the necessity to proceed against the stockholders, that the amount might be ascertained and an order obtained to enforce the liability. This proceeding was *ex parte*. The petition was filed, testimony taken, and the court found that it would require an assessment of seventy per cent upon the stockholders to pay depositors and expenses of receivership. The receiver was thereupon directed to proceed by bill in chancery to enforce the liability.

The theory of the receiver is that the bank was insolvent, and unable to pay its depositors in cash as their demands might be made upon it; that the liability of the stockholders of the bank to pay depositors is a contractual, and not a penal, liability or obligation; that this statutory liability creates and places at the disposal of the receiver an asset equal in amount to the capital stock, which he can use, when necessary, to pay depositors; that the bank had depositors whose claims were due at any time upon presentation, and due, as matter of law, when the bank shut its doors; that the duty of the stockholders to furnish funds with which to pay depositors was immediate, and the liability under the statute was one to be immediately enforced by the receiver; that the receiver in this proceeding represents in no sense the bank as a corporation, but represents the depositors only; that the necessity for the

assessment being apparent, and the amount of the assessment being ascertained with reasonable certainty, and that assessment being less than the par value of the stock, the proceeding to enforce the liability should be in equity, and might be against all the stockholders, although the obligation on the part of the stockholders is a several, and not a joint, one. On the other hand, it is claimed by some of the stockholders that the liability is a collateral one, and can be enforced only after it has been ascertained that the assets of the bank are insufficient to pay depositors; that this requires that the receiver shall absolutely exhaust the assets of the bank before applying to the stockholders for contribution; that the necessity for an assessment could not be determined by the court ex parte, but should have been upon notice and hearing; and that the order made for the assessment, and for this suit to enforce the assessment, was without jurisdiction, and not binding upon any of the stockholders.

Whether the court could proceed ex parte to make the order in this case is not now important. The petition made by the receiver gave the court jurisdiction to determine, at least, the necessity for the commencement of ⁶ the proceeding against the stockholders to collect some amount, as it was made apparent that there was a deficiency. On the hearing on the bill in the present case, the receiver, without waiving reliance upon the ex parte order determining the amount of the deficiency and declaring the necessity for the bringing of the suit, established by testimony the condition of the bank and the necessity for an assessment of at least seventy per cent, being the amount theretofore fixed by the court in the ex parte order.. There was no testimony offered on the part of the stockholders to show that the bank was solvent, or that the receiver's estimates were not correct; and, in fact, there was no testimony offered by the stockholders showing that the condition of the bank was not as claimed by him, nor did they attempt to question the value fixed by him upon the assets. Counsel for the receiver, however, cites many cases supporting the procedure for the ex parte order here taken, though he concedes that a stockholder might show in the proceeding that the bank was not in fact insolvent, but had ample cash or other assets with which to pay its indebtedness; and some of the cases cited by counsel seem to hold that a stockholder might show that the facts upon which the circuit judge acted in making the ex parte order were untrue, or that there was

collusion or fraud inducing the ordering of the assessment. But, as no such showing was made here, and the complainant did not rest upon the *ex parte* order, but introduced testimony showing the necessity and the amount, that question need not be discussed. We are satisfied that the court had jurisdiction, and that there was no error in directing the proceedings.

The liability may be enforced in law or equity: 3 Howell's Statutes, sec. 3208e5, being sec. 46, Act No. 205, Pub. Acts 1887. This section provides: "The stockholders of every bank shall be individually liable, equally and ratably, and not one for another, for the benefit of the depositors in said bank, to the amount of their stock at the par value thereof, in addition to the said τ stock; but persons holding stock as executors, administrators, guardians, or trustees, and persons holding stock as collateral security, shall not be personally liable as stockholders, but the assets and funds in their hands constituting the trust shall be liable to the same extent as the testator, intestate, ward, or person interested in such trust funds would be, if living or competent to act; and the person pledging such stock shall be deemed the stockholder and liable under this section. Such liability may be enforced in a suit at law or in equity by any such bank in process of liquidation, or by any receiver or other officer succeeding to the legal rights of said bank."

Section 55 of the act (3 Howell's Statutes, sec. 3208f4) reads: "On becoming satisfied that any bank has refused to pay its deposits, . . . the commissioner of the banking department may forthwith . . . apply to a court of record . . . for the appointment of a receiver for such bank, who, under the direction of such court, shall take possession of the books, . . . and may, if necessary to pay the debts of such bank, enforce all individual liability of the stockholders."

The national banking law contains a similar provision, the only difference being that the liability is imposed for the benefit of all the creditors of the bank, instead of for depositors only: U. S. Rev. Stats., sec. 5151. Under this United States statute, it is held that, when the comptroller of the currency orders an assessment upon stockholders in national banks, the necessity for the assessment and the amount of it are not open to question in a suit against stockholders: *Bushnell v. Leland*, 164 U. S. 684. The practice under our state banking law places the circuit judge in the position of the comptroller under the national banking act: *Citizens' Sav. Bank v. Ing-*

ham Circuit Judge, 98 Mich. 173. The petition for the appointment of the receiver is addressed to the circuit judge, and he makes the appointment. The receiver is an officer of that court. That court, by the terms of the statute, has jurisdiction to determine the necessity for making an assessment and the amount thereof.

The contention of defendants cannot be sustained. * The liability of the stockholders is fixed by statute. It is not a mere collateral undertaking. When the bank became insolvent, and closed its doors, the depositors were entitled to an immediate payment of their money; and when it was shown that the assets were insufficient to pay them, it became the duty of the stockholders to pay in the necessary amount, not exceeding the par value of the stock, to meet the demand. The obligation or liability of the stockholders is contractual, and not penal: *Western Nat. Bank v. Lawrence*, 117 Mich. 669. The stockholder is something more than a surety; he is one of the associates in the bank, and by the terms of the association he is deemed to undertake for the debts of the depositors: *Grand Rapids Sav. Bank v. Warren*, 52 Mich. 561; *Hobart v. Johnson*, 8 Fed. Rep. 493. Banking is carried on for the benefit of the stockholders. They are the only persons who profit by it. Depositors place their money in the bank in reliance upon the fact that they may withdraw it at any moment, or at a stated time. When demand is made for it, stockholders are liable for its immediate payment. The statute casts this burden upon them. It is one of the conditions imposed by the statute upon which stock may be issued and held. It became the duty of the receiver here to pay depositors at once, and, if the assets of the bank were insufficient for that purpose, he was bound to ascertain the amount necessary to meet the deficit. He took the proper steps to ascertain the necessity, and the court, upon the testimony, determined the amount which should be paid in.

Counsel for some of the stockholders cite the following cases from other states upon the proposition that no proceedings can be taken against the stockholders of a corporation until the assets have been first exhausted. In *Farmers' Loan etc. Co. v. Funk*, 49 Neb. 353, the action was by a depositor against a stockholder, and it was held that the creditor had no right to maintain an action at law in its own right against the individual stockholder of the bank, merely as such, for the collection of * an amount equal to the par value of the stock.

The court also discussed the question of the right of creditors and of the receiver under the banking law to proceed against stockholders before exhausting the corporate assets. Section 4, subdivision 7, article 11, of that constitution provides: "Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors, over and above the amount of stock by him held, to an amount equal to his respective stock or shares so held, for all its liabilities accruing while he remains such stockholder."

Section 4, subdivision 4, article 11, entitled "Miscellaneous Corporations," provides that, before enforcement of individual liabilities of stockholders, there must be judicially determined the indebtedness proposed to be enforced and the assets of the corporation be first exhausted. It was held that this last provision was applicable to banking corporations, as well as others.

The case of *Ueland v. Haugan*, 70 Minn. 349, was decided upon the wording of the statute of that state, and a distinction was made between that procedure and the procedure under the national banking act. The principle here involved was not there involved. The same may be said of the case of *Cleveland v. Burnham*, 55 Wis. 598. But in the case of *Booth v. Dear*, 96 Wis. 516, the action was under the banking law of that state, which provides that the stockholders of a state banking corporation shall be individually responsible to the amount of their stock for its indebtedness. The court said: "Such statute received construction at an early day to the effect that the liability is primary and absolute, and attaches the moment the debt is contracted by the bank; that it is a liability of all the stockholders to all the creditors, on the principle of a copartnership, the stockholders standing on substantially the same footing as though they were partners, save only that the responsibility of each is limited to a sum equal to his share or shares of stock. Subject to this limitation, they are answerable as original and principal debtors, and their liability more nearly ¹⁰ resembles that of copartners than any other with which it can be compared."

The court in that case further held that the statute did not require that the assets of the corporation should be fully exhausted before the creditors could proceed to judgment against the stockholders.

The case of *Hanson v. Donkersley*, 37 Mich. 184, upon which counsel for defendants rely, was brought under 1 Howell's Statutes, section 4017. That statute provides for the organization

of mining and manufacturing companies. It imposes upon stockholders an individual liability for labor done for the corporation, and allows it to be enforced against the stockholders only after the return of an execution unsatisfied, thus making the liability secondary, and not primary; and the remarks of Mr. Justice Campbell in that case have no bearing here. The same may be said of the case of *Kamp v. Wintermute*, 107 Mich. 635, brought under a like statute, and of *Voight v. Dregge*, 97 Mich. 322, brought under the street railway act. Each of these acts provides for the return of an execution unsatisfied before the action can be brought against the stockholders. The banking law does not provide for this, and was evidently intended to make the liability of each stockholder primary, and not secondary. As was said in *Grand Rapids Sav. Bank v. Warren*, 52 Mich. 561: "The shareholder is something more than a surety; he is one of the associates in the bank, and by the very terms of the association he is deemed to undertake for the debts which the bank contracts."

It is evident that the banking law of 1887 was framed with great care to insure safe banking, and with a view to protect the depositors by compelling the payment by stockholders of a sum equal to the amount of stock held. This fund should become immediately payable when the necessity for its use is determined and the amount fixed, without waiting to exhaust the assets of the bank, if it appears that the stockholders will ultimately be called upon ¹¹ to make good the amount. Banking institutions have relations with the public wholly unlike any other business institutions, and the rights of depositors in banks have been carefully guarded by the act. We think the contention of counsel for the receiver is sound in principle and must be sustained.

Counsel for defendants contend that the act is unconstitutional, for the reason that it limits the personal liability of stockholders to depositors, while the constitution provides that they shall be liable for all debts. This contention cannot be sustained. Section 3, article 15, of the constitution of this state, provides: "The officers and stockholders of every corporation or association for banking purposes, issuing bank-notes or paper credits to circulate as money, shall be individually liable for all debts contracted during the term of their being officers or stockholders of such corporation or association, equally and ratably, to the extent of their respective shares of stock in any such corporation or association."

This constitutional provision relates to banks of issue only. The People's Savings Bank was not a bank of issue. The provisions of the banking law do not come within this constitutional provision. It is limited to banks not of issue. The legislature had the power to impose the conditions prescribed in the act upon banks organized under the act, and to limit the liability of the stockholders to depositors. In *Allen v. Walsh*, 25 Minn. 543, this precise question was raised under a somewhat similar constitutional provision, and it was held that that provision was confined to banks of issue, and did not limit the power of the legislature as to banks not of issue: See, also, *Harper v. Carroll*, 66 Minn. 487; *Allen v. Clayton*, 63 Iowa, 11, 50 Am. Rep. 716.

One of the most important questions in the case relates to the inquiry whether, when a bank suspends, those who are the then stockholders are liable under this statute to those who are then its depositors. It is the contention of ¹² some of the stockholders that those who were stockholders when each deposit was made are liable to depositors; that is, that a stockholder can be called upon to respond to those only who became depositors while he was a stockholder. It is insisted, therefore, that the rule of *Kamp v. Wintermute*, 107 Mich. 638, should be applied. That action was brought under an act to revise the laws providing for the incorporation of manufacturing companies, and it was held that statute could not have so broad a construction as to hold one liable who purchases stock in a corporation after the debt is contracted; that is, that a stockholder, under the act, cannot avoid the statutory liability to creditors who are such at the time he transfers his stock, and that the transferee does not take the stock subject to such statutory liability. Several cases were cited in that case to sustain that principle. That statute, and the statutes of other states under which the rulings were made, had reference to corporations other than banking. They provide a remedy for the individual creditor against the individual stockholder, so that it is not difficult for any individual creditor to ascertain who were the stockholders at the time the debt was created. The liability imposed by these statutes is for the whole debt. A man with five shares of stock of the par value of \$50 may be held to pay a labor debt of \$500. The effect of these statutes is to make shareholders, as to labor debts, partners, each liable for the entire debt. Our banking statute does not give this remedy to the creditor. It can be en-

forced only by a bank in process of liquidation, or by a receiver or other officer succeeding to the legal rights of the bank, in a suit at law or in equity. The distinction between the banking statute and these other statutes, and the construction to be placed upon them, so far as concerns the rights and liabilities of stockholders, is well stated by counsel for the receiver, as follows:

"(a) In a partnership, all partners are liable for all debts. Corporations are formed for the purpose of avoiding the personal individual responsibility of those associating ¹² and making the capital stock and assets of the corporation the sole fund for creditors. But the legislature may, and by the constitution of a state is sometimes directed to (sometimes the constitutional provision is self-executing), grant charters on condition that the partnership or common-law liability of the associates as to certain kinds of debts shall continue.

"(b) The legislature does so except or preserve a partnership or common-law liability or obligation when it makes all stockholders liable for all debts of a certain kind or class, and provides a direct or personal remedy to the individual creditor of the corporation. In such cases it is held that the stockholders at the time the debt is contracted are like partners, at once and personally liable to pay it—an obligation not shifted by transfer of stock.

"(c) When, however, the legislature has not plainly so attempted to preserve or retain for creditors a liability and remedy which, but for the law of corporations, would exist, but has in the incorporating act added a liability, limited, peculiar, purely statutory, and not in any sense preservative of common-law liability, the remedy provided being for all creditors, or all of a class of creditors, enforceable in their joint interest against the body of stockholders, then the liability attaches when the right of action—the default—occurs, and is against those who are then stockholders."

It is not claimed that these propositions are recognized in all the cases, but counsel submits them as deducible from the cases, and claims that by them the cases may be better harmonized, and a reasonably safe rule of construction presented. In this contention we agree with the learned counsel. In some of the states, the banking statute itself fixes the rights and liabilities of stockholders in express terms. The New York statute provides that "no action shall be brought against a stockholder after he shall have ceased to be a stockholder": Laws

1892, c. 688, sec. 55. In Wisconsin, the statute expressly declares that a shareholder by transfer shall, in proportion to his shares, succeed to all the rights, and be subject to all the liabilities, of prior shareholders: Rev. Stats. 1858, c. 71, sec. 5. In Nebraska, the constitution provides that the stockholder shall be liable, etc., while he remains such stockholder: Const., art. 11, sec. 4, subd. 7. In Minnesota, by ¹⁴ statute, the liability continues for one year after any transfer or sale of stock by any stockholder: Gen. Stats. 1894, sec. 2501. In Iowa, the stockholder's statutory liability is while he remains a stockholder: Laws 1880, c. 208, sec. 1. Our statute (3 Howell's Statutes, sec. 3208e5) simply provides that "the stockholders of every bank shall be individually liable, equally and ratably, . . . for the benefit of the depositors in said bank," etc., and by the same section provides that such liability may be enforced in a suit at law or in equity, by any such bank in process of liquidation, or by any receiver, etc. It seems clear to us that it was the legislative intent that the stockholders liable to depositors are those who are such at the time the bank becomes insolvent, without reference to the time when the deposits were actually made. Any other construction would practically repeal the entire liability clause. It is within the knowledge of all that deposits in banks are changing hourly during each day's business, thus creating uncertainty concerning the true amount on deposit at any given time. When a bank closes its doors, this change ceases. If the man who has a balance on deposit at the time the bank is closed must ascertain who were the stockholders at the time he made his deposit, and must proceed against them, there could be no common suit by a receiver for the benefit of all the depositors; for the stock in the bank might have been many times changed during the time deposits were made, and no rate could be established. It is more reasonable to hold that the purchaser of stock takes it, as a proportionate share of the bank's assets, subject to the bank's debts. With these rules in view, we may now proceed to determine the special claims made by the several defendant stockholders.

Defendant Chatterton became the registered owner of twenty-five shares of stock on April 1, 1892. This certificate was afterward surrendered and divided, one for twenty shares being retained by him, and one certificate issued to his son, Floyd M., for the other five shares. Defendant Chatterton remained the owner of these twenty shares at the time ¹⁵ the

bank closed. He claims he should not be held as a shareholder because he purchased his stock upon false representations made as to the value of the stock by the officers of the bank. As we have said, the receiver represents the depositors in this suit. It is their rights which are to be protected. The question here raised was squarely presented in *Bissell v. Heath*, 98 Mich. 472, and it was held that a stockholder, after having purchased his stock and registered it, receiving dividends, which he retains and permitting the depositors to rely upon his apparent ownership, cannot repudiate his liability on the ground that he was induced to purchase his stock through fraudulent representations as to the financial condition of the bank. In that case, Mr. Justice Montgomery cited with approval the case of *Stone v. City and County Bank*, 3 C. P. Div. 282, in which it was held that where the corporation has gone into liquidation, and is proceeding, under the winding-up act, to make calls to satisfy claims of creditors, it is too late for one who has, up to that time, allowed his name to appear as a stockholder, to avoid liability on the ground that his subscription was obtained by fraud. The rule stated must be applied to defendant Chatterton.

Defendant Fraser became the owner of ten shares of stock December 31, 1895, and remained the ostensible owner up to the time the bank closed. He makes the like claim as defendant Chatterton, and his case must be governed by the same rule. The decree below fixes the liability of these defendants at seventy per cent of the par value of their respective shares, and must be affirmed as to them.

It appears that defendant Mifflin held a certificate for five shares, dated April 1, 1892. As to these shares he admits he was the registered owner, and liable to the assessment levied. The receiver contends that Mr. Mifflin is the owner of five other shares, and liable to pay an assessment upon them. This Mifflin contests. These shares were issued originally to Hart Row. It appears from the testimony ¹⁶ that this certificate was left by Row with Mr. Dyer to be sold, and that on September 4, 1895, Dyer sold it to Mifflin for \$95 a share, Row paying him a commission of \$10. Mr. Row says that he learned from Mr. Otis, the teller of the bank, that the stock had been sold. Mr. Otis testified that Mr. Mifflin came to the bank, and, after consulting with the cashier, he (Otis) was directed to loan Mifflin \$500 on his note, which he did, and that Mifflin left with him (Otis) \$475 of the \$500, requesting him to place it to the

credit of Mr. Row. This was done. Mr. Mifflin, on the same day, left with Otis the certificate of shares as collateral to his note. This certificate was placed in an envelope, and marked "Elgin Mifflin." It was assigned in blank by Mr. Row. The matter stood in this way, except for partial payments on the note by Mr. Mifflin, until July 13, 1896—about ten months. The transfer was never made upon the books of the bank. The Mifflin note was paid partly before and partly after the receiver was appointed. Mifflin, upon final payment of his note, being tendered the stock, refused to take it from the bank. The defense now made is that, in enforcing the liability of stockholders, the court will not go beyond the registered holders. There is no doubt, under this state of facts, that Mr. Mifflin was the owner of the stock, and could have compelled a transfer upon the books of the bank. He became a stockholder, had the right to attend meetings and to share in the profits, and, in fact, was entitled to the rights of every other stockholder: *McLean v. Charles Wright Medicine Co.*, 96 Mich. 479. Being entitled to all the rights of a stockholder, he cannot escape the liability of such stockholder. The mere fact that the stock had not been transferred on the books of the bank cannot aid the defendant. The stock was fully paid for, and Mifflin was a stockholder within the meaning of the banking act, and the court below was not in error in so holding.

Defendant Edmonds was a registered stockholder, as appeared by the books of the bank when it closed. He ¹⁷ seeks to avoid liability on the ground that he was discharged from the ownership, and from liability as a stockholder, by a sale and transfer of the stock in December, 1894, or January, 1895. It appears from the testimony of Mr. Edmonds and of Mr. Otis, the teller of the bank, that on the strength of a promised purchase of this stock by Mr. Osband, the cashier of the bank (for himself, not for the bank), Mr. Edmonds overdrew his account at the bank \$300. He transferred the stock to Mr. Osband individually. Six days later he received his pass-book from the bank, and it still showed the overdraft. On January 15th he went to the bank, and asked Osband if he had given him (Edmonds) credit for the \$300. Osband replied that he had not, but would. Osband then, in the presence of Edmonds, instructed Mr. Otis to place upon Edmonds' pass-book a credit of \$300. Otis did so, then and there making as a part of the entry the letters "C. H. O." (meaning C. H. Osband). Osband never paid the bank. The certificate of stock was found

Ohio, receiving therefor \$700 in cash and \$300 in settlement of a claim which Schuman had against him. The assignments were properly made on the backs of the certificates. Mr. Stahl took them to the bank, and asked that new certificates be issued, which ²⁰ the cashier agreed to do. This was neglected by the cashier. Soon after the sale of the stock, Mr. Stahl learned that the stock was assessed to him, and went to see the cashier about it, who said: "That is all right. The stock is transferred, and I will give you a writing to that effect." He then gave him the following writing:

"May 24, 1896.

"Mr. Jacob Stahl has transferred his stock in this bank to George Schuman, of Cleveland, Ohio.

"C. H. OSBAND,
"Cashier."

When the bank closed on July 11, 1896, the certificates were in the bank, and no transfer had been made on the books of the bank. The sale to Mr. Schuman is not disputed. The consideration is not denied, and the proofs show that Schuman was a man of considerable means. He died soon after this purchase, leaving an estate estimated at \$15,000 to \$20,000.

Some intimation is contained in the brief of counsel for the receiver that this was not a good faith sale. We have examined the testimony with some care, and we are unable to say that Mr. Stahl was not acting in good faith. There is nothing in the evidence to show that he knew or suspected that the bank was in failing circumstances, and that he assigned this stock to avoid liability as a stockholder.

It is the contention of counsel for the receiver that, at the time of this sale, the bank was wholly insolvent, and for that reason, and the reason that Schuman was a nonresident, Mr. Stahl should be held liable as a stockholder. The case is different from that of Mr. Edmonds. There it could not be said that the bank was insolvent at the time of the sale to Osband, and Osband, the purchaser, was a resident of the state. Considerable testimony was given in the case as to the condition of the bank for nearly a year before it closed its doors. The court below found that the bank was insolvent at the time Mr. Stahl made the transfer to Schuman, and remained so until it closed its doors; and we think the testimony sustains this finding. ²¹ But, as we have said, there is no testimony showing that Mr. Stahl knew this fact. Can he, then, be held liable, though he did not know it? The court below ruled that he

could be so held, because, if he had brought a proceeding against the officers of the bank to compel a transfer by them upon the books of the bank, and they had shown that the bank was then insolvent, and the transfer was to a nonresident, the transfer would not have been enforced by the courts, as it would defeat the depositors of that much of the fund. This is not the true test of Mr. Stahl's liability, and the rule laid down by the circuit judge cannot be sustained. The act under which suit is brought by the receiver is very much like the national banking act, and the rules laid down by the federal courts in reference to the liability of stockholders have great weight in determining the questions here presented. The rule laid down by the federal courts seems to be that the burden is upon the receiver of a national bank to show that a transfer of stock was made by the stockholder for the fraudulent purpose of avoiding liability as such stockholder: *Sykes v. Holloway*, 81 Fed. Rep. 432. Thompson, in his work on *Liability of Stockholders*, section 215, lays down the rule that a transfer of shares in a failing corporation, made by the transferrer with the purpose of escaping his liability as a shareholder, to a person who, from any cause, is incapable of responding in respect to such liability, is void as to the creditors of the company, and as to the other shareholders, although, as between the transferrer and the transferee, it was out and out: Citing *Nathan v. Whitlock*, 9 Paige, 152; *McClaren v. Franciscus*, 43 Mo. 452; *Marcy v. Clark*, 17 Mass. 330; *Johnson v. Laffin*, 5 Dill. 65. This proposition by Judge Thompson is quoted with approval by the court in *National Bank v. Case*, 99 U. S. 631. It was said by the court in *Bowden v. Johnson*, 107 U. S. 261: "But it was held by this court in *National Bank v. Case*, 99 U. S. 628, that a transfer on the books of the bank is not in all cases enough to extinguish liability." ²² The court in that case defined, as one limit of the right to transfer, that the transfer must be out and out, or one really transferring the ownership as between the parties to it. But there is nothing in the statute excluding, as another limit, that the transfer must not be to a person known to be irresponsible, and collusively made, with the intent of escaping liability, and defeating the rights given by statute to creditors."

With these restrictions, and certain others which it is not important to enumerate here, as they do not affect the rights of the parties in this case, it is, we think, well settled by the adjudicated cases that the stockholder has the right to make

an out and out bona fide sale to any person capable in law of taking and holding the same, and of assuming the liabilities of the transferrer in respect thereto. This right of transfer is of great benefit to stockholders. It is what gives value to the stock. The fact that the shares are transferable on the books of the bank does not limit the right of transfer and to pass the title to the transferee. It is true that the officers of the bank will not be compelled to make the transfer on the bank's books, under the provisions of section 3208a8 of 3 Howell's Statutes, when the transferrer is indebted to the bank: *Citizens' State Bank v. Kalamazoo County Bank*, 111 Mich. 313. But no such claim of indebtedness is here made, and it is well settled that the title passes to the transferee the moment the assignment is made and stock delivered: *Johnson v. Laffin*, 5 Dill. 65. The purpose of requiring a transfer on the books of the bank is that the bank may know who are the stockholders, and, as such, entitled to vote, receive dividends, etc., and for the protection of bona fide purchasers of the shares, and of creditors and persons dealing with the bank. It does not restrict the right of the owner to transfer his stock, but clothes the corporation with the power to register bona fide transfers: *Black v. Zacharie*, 3 How. 483; *Union Bank v. Laird*, 2 Wheat. 390; *St. Louis etc. Ins. Co. v. Goodfellow*, 9 Mo. 149; *Moore v. Bank of Commerce*, 52 Mo. 377; *Hill v. Pine River Bank*, 45 N. H. 300.²⁸ No showing is made here that the bank officers refused to make the transfer on the bank's books. Instead, the cashier, who had the power to make it, promised to do so, and led Mr. Stahl to believe that the matter had been properly arranged, so that he was released from liability thereunder and Mr. Schuman protected as a bona fide purchaser. Mr. Stahl had a right to rely upon this.

We do not think that the fact that Mr. Schuman was a non-resident can affect the rights of Mr. Stahl. There is nothing in the act which limits transfers to residents of the state. A nonresident may own such shares, and become liable thereunder, the same as a resident owner; and we know of no reason why such liability cannot be enforced in Ohio as well as here. The engagement by the stockholder is contractual, and may be enforced in the courts: *Western Nat. Bank v. Lawrence*, 117 Mich. 669. We are aware that *Spelling on Private Corporations*, at section 469, lays down the rule that the right to transfer terminates by insolvency and dissolution, and that even before the insolvency is made public, if it actually exists, to

allow stockholders to transfer their interests to persons beyond the jurisdiction of the court would be opening the door to subterfuges calculated to defeat the claims of creditors, and that creditors might defeat such transfers; but he cites no authorities to sustain this proposition, and, on the contrary, says a number of cases maintain the opposite—citing the case of *Johnson v. Laffin*, 5 Dill. 65. We think Mr. Stahl cannot be treated as a stockholder, and held liable as such.

Defendant Row was the owner of stock on the first organization of the bank. When it was reorganized he received a stock dividend, and increased his holding to twenty-five shares. This was April 1, 1892, and his stock stood in his name on the books of the bank until July 8, 1896, when it was transferred to his son. The bill in this case, after charging the insolvency of the bank and of the son of Mr. Row, to whom the stock was transferred, alleges: "Said Row suspected or believed said bank to be insolvent, ²⁴ and such transfer was made by him for the purpose of escaping liability as a stockholder in said bank." There is no testimony to sustain the charge that Mr. Row believed or suspected the bank to be insolvent, and that he made the transfer to avoid liability. The bank had been doing business in the usual way up to the time the transfer was made on the books of the bank. It appears that Mr. Row had made advances of like amounts of property to his other two sons, and to equalize the gifts to them he gave this stock to his son Charles. It was consummated by the surrender of the certificate of stock to the proper officer of the bank on June 20th, with instructions to make the proper entry on the stock-book to make the transfer complete. On July 8th the proper entry was made, and the certificate delivered to the son; and the bank failed and closed its doors on the 11th, or three days later. It was a completed gift of the stock to the son, and without any knowledge on the part of the donor that the bank was insolvent. The sole question, therefore, is, Did such bona fide transfer by gift relieve the transferrer from liability under the statute? This liability is purely statutory, is a derogation of the common law, and must be strictly construed. Courts will not hunt excuses to carry it beyond the plain provisions of the statute: 1 Cook on Stock and Stockholders, sec. 214. All the authorities recognize the right to transfer in good faith and for a valuable consideration. When this is done, and the bank is a going one, statutory liability attaches only to those who are stockholders at the time the bank closes, either by

action of its directors, by the action of the commissioner of banking, or by proceedings in chancery to wind up its affairs.

The learned counsel for complainant cites no decision to sustain the proposition that a bona fide gift and transfer of stock does not relieve the transferrer from liability. His quotation from 1 Cook on Stock and Stockholders, section 395, does not treat of the question now before us. The author is treating solely of the "rules for corporations in regard to refusing or allowing registries of transfers of ²⁵ stock." The question the author is discussing is no other than whether a corporation may refuse to register a transfer to an irresponsible transferee. He reaches the conclusion that the officers of the corporation may refuse to do so when the corporation is insolvent, but cannot refuse when the corporation is solvent. The power of the officials of the bank to register transfers is not before us. We are dealing with a case where the transfer has been made. The cases all seem to hold that the intent to avoid liability is a material element in determining the liability of one who has transferred his stock while the corporation was a going one. If this transfer had been made for a valuable consideration, it would, under the authorities, be valid, and relieve the transferrer from liability. No case is cited by counsel which makes a distinction between a good and a valuable consideration. The statute does not restrict, and is not intended to restrict, the transfer of the stock of a bank. The courts, in order to preserve the statutory liability for the benefit of creditors, have held that transferrers in bad faith, no matter what the consideration received, are still the equitable owners of the stock for the purpose of responding to the creditors.

Counsel for complainant relies largely upon the case of Stuart v. Hayden, 169 U. S. 1. The question here considered was not involved in that case, and there is nothing to show that it was considered by the court. The case was decided upon the intent of the stockholder to avoid his liability. The court used this language: "Whether—the bank being in fact insolvent—the transferrer is liable to be treated as a shareholder, in respect of its existing contracts, debts, and engagements, if he believed in good faith, at the time of transfer, that the bank was solvent, is a question which, in the view we take of the present case, need not be discussed, although he may be so treated, even when acting in good faith, if the transfer is to one who is financially irresponsible."

It appears from this that the question was not discussed by the court, and the last clause must be considered as mere dictum.

²⁶ The precise question was raised and decided in *Sykes v. Holloway*, 81 Fed. Rep. 432, in May, 1897. The facts are substantially parallel with those in the case before us. The question is thus stated: "We must presume from the evidence in this record that this transfer was made, not for a valuable, but for a good, consideration only, and that it was in fact an out and out transfer, made without knowledge or notice of the embarrassed condition of the bank; yet it was made by a mother, who could respond to her liability as a stockholder, to a daughter, who could not then respond in any degree to that liability. It therefore, to that extent, impaired the security of the existing creditors of the bank; and the inquiry is whether that fact, which was known to Mrs. Holloway, is sufficient to cause the setting aside and cancellation of said transfer."

The learned judge in that case said: "I find in the decisions some broad expressions which would seem to sustain the contention of the complainant, but I have been unable to find any case in which the pecuniary condition of the transferee is a material element on the question of sustaining the transfer. It is a most material matter where the inquiry is whether or not the transfer is a bona fide out and out transfer, or a mere sham; but, as far as we have examined the cases, none of them go to the effect that if the transfer, though without a valuable consideration, was bona fide, and the transferrer had no knowledge of the embarrassed condition of the bank, and no information which would have given him or her such notice, such transfer is invalid or fraudulent. . . . It seems to us that, upon principle, the pecuniary condition of the transferee of stock in a national bank at the time of the transfer, while material upon the inquiry of whether or not the transfer is bona fide or colorable, cannot be a decisive element on the question of liability of the transferrer, where the transfer has been made out and out, without knowledge or notice of the failing condition of the bank. Such a test of liability of a transferrer of stock would materially destroy the transferability of such stock, and would be an impracticable test to apply; and even though it be conceded, as in this case, that the consideration for the transfer was a good, but not a valuable, one, that fact should not be sufficient to set aside and make fraudulent the transfer."

²⁷ It must be assumed that the learned counsel in the pres-

ent case has carefully examined the decisions, and cited us to all there are upon the subject. Probably the reason that there are no more decisions upon the precise question is that cases have seldom arisen involving it. The courts of England hold that the shareholder is not liable where he has made an out and out transfer, and do not consider the motive; holding, however, that where the transfer is merely colorable, or to a mere dummy, the shareholder retains such an interest as makes him liable. The courts of this country have, as already shown, gone further, and hold the transferrer liable when they find an intent to escape the statutory liability. We see no reason why the rule should be carried further. To hold otherwise would be to hold the stockholder liable where he has made a bona fide gift of the same for a good consideration, and to continue his liability for months, and even years, afterward, if evidence can be produced that at the time the bank was embarrassed. The law contains no language to justify an implication that it was intended to impose this double liability upon bona fide transferrers of stock. We think that courts are not justified in reading such a liability into it.

The decree must be affirmed as to defendants Chatterton, Fraser, and Mifflin, with costs, and reversed as to defendants Edmonds, Stahl, and Row, and as to them the bill will be dismissed, with costs of both courts.

The other justices concurred.

CORPORATIONS—NATURE OF STOCKHOLDERS' LIABILITY.—The liability of a stockholder in a corporation for its debts is primary: *McGowan v. McDonald*, 111 Cal. 57, 52 Am. St. Rep. 149. See, too, the extended note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 848-852. If a statute provides that stockholders in a corporation shall be liable for its debts, such liability must be regarded as contractual and not penal: *Bell v. Farwell*, 176 Ill. 489, 68 Am. St. Rep. 194. Compare *Marshall v. Sherman*, 148 N. Y. 9, 51 Am. St. Rep. 654; and see the monographic note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 846, 847.

LIABILITY OF STOCKHOLDERS—EFFECT OF FRAUD ON. If a shareholder whose subscription was obtained through fraud has not been vigilant in discovering it and repudiating the contract, the fraud will be no defense as to creditors of the corporation: See the monographic note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 825.

THE LIABILITY OF STOCKHOLDERS IN CASE OF A TRANSFER of stock is discussed in the note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 860-867. See, too, *Parker v. Carolina Sav. Bank*, 58 S. C. 583, 69 Am. St. Rep. 883, and note.

WHO ARE STOCKHOLDERS LIABLE FOR CORPORATE DEBTS is treated in the note to *Thompson v. Reno Sav. Bank*, 3

Am. St. Rep. 858-860. In order to constitute one a stockholder in a corporation, it is not necessary that a certificate of stock should be issued: *Holland v. Duluth Iron etc. Co.*, 65 Minn. 324, 60 Am. St. Rep. 480.

BANK CORPORATIONS—WHAT INCLUDED UNDER.—A constitutional provision that stockholders in bank corporations shall be liable for the corporate debts is applicable only to banks issuing bills of circulation: *Allen v. Clayton*, 63 Iowa, 11, 50 Am. Rep. 716.

HOLMES v. COMMON COUNCIL OF DETROIT.

[120 Michigan, 226.]

MUNICIPAL CORPORATIONS—PUBLIC CONTRACTS—PATENTED ARTICLES.—Although material to be used in the construction of a public work is in the control of a single dealer, by reason of a patent or otherwise, specification of that material may be made in a contract for such work to be let on competitive bidding.

C. Flowers and J. J. Speed, for the appellants.

Warner, Codd & Warner, for the appellees.

²²⁶ **HOOVER, J.** The law creating the board of public works of the city of Detroit provides that all paving shall be done "upon contracts and under specifications to be prepared by such board and approved by the common council," and directs that "the board shall advertise for proposals to execute the work according to plans and specifications, and the board may contract with the lowest responsible bidder": 3 Laws 1873, Act No. 392, sec. 18. The board adopted specifications for repaving its streets, and these were approved by the common council. It was apparently designed to have some uniform rule. These provided that all brick should be of a quality to be approved ²²⁷ by the board of public works, and equal to approved samples in its office, and that each bidder should state in his bid the kind of brick that his proposition was based upon, which should be of such kind as had been approved by the board of public works. In December, 1897, tests were made under the direction of the board, and three kinds of brick were approved, viz., Nelsonville, Metropolitan, and Century. On April 29, 1898, the board advertised for proposals for repaving Atwater and other streets according to these specifications, each bidder being requested to name in his bid a separate price on

each of the three kinds of brick mentioned. The complainants were bidders, as was also John McLaughlin. His bid named the kinds of brick which he proposed to use. The bid of the complainants did not, but was accompanied by a letter which stated that they proposed to furnish "paving block brick of established reputation, that have been tested by the city of Detroit in the recent test by your body, and also the common council, and which have demonstrated in that test, and also in use in different cities, to be equal at least to the Metropolitan, Century, and Nelsonville blocks; and we are prepared to enter into a contract, and guarantee these goods equal to those named."

The board of public works rejected the bid of Holmes & Strachan, for the reason that it did not name the kind of brick, as mentioned in the advertisement and as required by the specifications, and reported the bid of McLaughlin, as the lowest bid, to the common council, accompanied with the proper contract for confirmation. The bid of Holmes & Strachan named a lower price than the bid of McLaughlin for which they would do the work. The object of the present suit on the part of complainants is to restrain the common council from confirming the McLaughlin contract. The ground upon which this relief is asked is that the sale of the three kinds of brick in Detroit is controlled by one Stevens, who, as agent for the manufacturer, has exclusive authority in that market, and that there was therefore a monopoly, and no competition ²²⁸ in the bidding. The circuit court so held, and the board was enjoined from executing the contract.

Complainants' proposition seems to be that, under the charter, no paving contract shall be let which involves the use of any material which, by reason of its exclusive production, is not subject to competition, or perhaps, more accurately, complainants' claim is that such contract cannot be made for the use of such material except when it has been subjected to a competition with some other material. This would result in some serious consequences. If such is the rule, the city may be denied the right to have the pavement that it wants, because some one is willing to furnish something else, that may be thought equally good, for a less price. One or two blocks of a street may be paved with Nelsonville brick, but when it is desired to extend the pavement, they cannot take bids, and proceed to pave with the same, if some other brick can be obtained cheaper. It may be that the cheaper price is made by inter-

ested parties, at a loss, to injure a rival, or for some other ulterior purpose, or because of insolvency, or it may be untried brick, or it may happen that the competing brick is not likely to be thereafter obtainable for repairs. But this would make no difference; the city must be subjected to these dangers and inconveniences, because it can obtain a lower bid. Thus, a pavement would be likely to be of a variegated pattern. This doctrine, carried out to its logical consequences, would prevent a city from doing any public work after an intelligent and well-digested plan, and the harmony and beauty of public improvements would be impaired. Whenever any article that should be the subject of a monopoly should be found to enter into a building or other improvement, the contract would be void, and payment could be enjoined by any taxpayer, if complainants' claim rests on solid ground. In this age of improvement and competition, we should not hold that municipalities are denied the most modern methods and improvements, unless it is clear that they have been prohibited. Many valuable innovations ²²⁹ involve patents; others are introduced through agencies, as in this case, and they are therefore practically controlled by one person or firm. Again, some kinds of stone come from a single quarry; limes and cements differ in quality, and some may not be safely used; and in many instances the superiority of a given article is generally recognized. In this instance the fact that the Nelsonville brick are handled by a single agent has no especial significance, for back of the agent is the principal; and it goes without saying that he fixes the price, and has his monopoly, whether he has one agent or more.

The gist of the complainants' claim is that the city cannot specify the brick or other material made and controlled by one manufacturer, but must open the proposed improvement to competitors, and submit to the consequences of competition. It is to the interest of the greater number of manufacturers to have such a rule adopted, yet it is not a rule that private persons adopt in their own matters, for obvious reasons. This departure from such business principles is based upon the danger of supposed venality of public officials. The consequence is that, when a public work is to be undertaken, those having it in charge are seldom left to conduct their negotiations, make the contracts, and answer to the public for a faithful performance of duty. Everyone who has anything to sell insists on being heard; one accuses another of bribery; the board hav-

ing the matter in charge, and its individual members, are accused of corruption; and after the award the work is delayed by litigation and injunctions, to the great inconvenience and cost of the taxpayers, and almost uniformly without any good result. So prevalent are these practices that they have become most serious obstacles to public improvement, and prolific sources of slander and vituperation, until many of our best citizens refuse to give to municipalities the benefit of their services, lest they be subjected to such charges. These things are so common that we may properly take notice of them, and we may well doubt a construction of ²³⁰ a law which shall encourage them and produce such results. A more sensible view to take would seem to be that those charged with the making of an improvement should determine definitely what is wanted, and then advertise for bids, and let the contract to the lowest responsible bidder, leaving him to procure the material required as best he may. Such is the view entertained by many eminent jurists. There are others who have thought it necessary to eliminate every element of monopoly, in a vain effort to prevent any corruption whatever, and permit the use of no materials which could not be bought in the open market, or at least from competitive bidders. Such a case is *Fishburn v. Chicago*, 171 Ill. 338, 63 Am. St. Rep. 236, where it was held that specifications could not lawfully restrict bidders to the use of one kind of asphaltum, which was produced by one concern. The strongest argument of that case is the following, which probably states the merits of the question as strongly as it can be stated: "But it may be said that cities, in the construction of public improvements, ought to have, as have individuals in the construction of private structures, the right to select for use the article or substance best fitted and adapted to the purpose, and that to deprive the public of the right to select and use such superior articles is opposed to public policy, and positively disadvantageous to the public. The force of this argument must, of course, be admitted; but, upon reflection, it is readily seen it is not necessary to foster and create a monopoly, and prevent competition in the letting of public contracts, by providing in ordinances that a certain substance or article, and no other, shall be used. If it be the judgment of the city council that the most suitable and best material to be used in any contemplated improvement is the product of some particular mine or quarry, or some substance or compound which is in the control of some particular firm or corporation, the

ordinance might be so framed as to make such production, substance, or compound the standard of quality and fitness, and to require that material equal in all respects to it should be employed. An ordinance making it indispensable that an article or substance in the ²³¹ control of but a certain person or corporation shall be used in the construction of a public work must necessarily create a monopoly in favor of such person or corporation, and also limit the persons bidding to those who may be able to make the most advantageous terms with the favored person or corporation. If all the ordinances adopted by the city council of the city of Chicago providing for the paving of streets and public places in the city should select the stock in trade of a particular firm or corporation as the only material to be used in making such street improvements, the evil would be intolerable; and, if they may lawfully select such article in one ordinance, it cannot be unlawful to make it the settled policy of the city that material for paving streets should be purchased of but one seller. Because of the error of the court in ruling the proffered testimony was inadmissible, the judgment must be reversed, and the cause remanded." This case seems to rest on Illinois decisions.

We are cited to the case of *Dean v. Charlton*, 23 Wis. 590, where it was held: "Where a city was empowered by its charter to improve streets at the expense of adjoining lot owners, but required to let all such work to the lowest bidder, it could not contract for laying a pavement at the expense of such lot owners, the right to lay which was patented, and owned by one firm."

It is obvious that a patented article is much more certain to be the subject of a monopoly than brick manufactured from certain clay and by certain parties, and therefore much more likely to require the application of the rule contended for. Yet this court has held that such may be specified by cities: *Attorney General v. Detroit*, 26 Mich. 263.

Counsel seek to draw the line at patented articles; but we see no distinction between brick made by the Nelsonville company under patents, and brick made by the same company, but not under patents. In the concurring opinion of the late Chief Justice Christiancy in the case cited, he places a construction upon such laws as that under discussion which commends itself to our approval. He says: ²⁸² "When the pavement of a street is in contemplation, there are two kinds of competition which it is very desirable to create among those who may wish to

undertake the work: 1. That between the different kinds of pavement, or those prepared to engage in putting them down; and 2. That between parties prepared to put down the same kind. It is the latter species of competition only which the charter requires the city officers to take measures to secure, and it is for this purpose only that it requires publication of the notice, plans, and specifications. . . . But those bids only which had reference to the same particular kind, and to the same specifications, could be considered as competing bids, for the purpose of determining who was the lowest bidder within the meaning of the charter."

In *Kilvington v. Superior*, 83 Wis. 222, it was held: "The fact that the mode of building the crematory was patented did not render a contract therefor invalid, under section 921 of the Revised Statutes (requiring it to be let to the lowest bidder), where the entire work was done at the general expense of the village, and the use of the patent was offered to the village and to all contractors at a fixed price, and there was free competition as to everything else. *Dean v. Charlton*, 23 Wis. 590, distinguished and limited."

The court said: "Upon the authority of *Dean v. Charlton*, 23 Wis. 590, it is contended that, as the mode of building the crematory was a patented one, the contract was void, on the ground that there could not be fair competition in bidding for the work, which by the charter was required to be let to the lowest bidder: Rev. Stats., sec. 921. The case of *Dean v. Charlton*, 23 Wis. 590, was decided by a divided court, and there was a vigorous and able dissenting opinion by Chief Justice Dixon. The legislature subsequently validated the assessments so held void in that case, and in *Mills v. Charleton*, 29 Wis. 400, 9 Am. Rep. 578, and *Dean v. Borchsenius*, 30 Wis. 236, the validity of this legislation was sustained. Since that time the direct question involved in that case, which was in respect to assessments against abutting lots for paving the street, has not been before the court; but in *Dean v. Charlton*, 23 Wis. 590, the majority ²³³ of the court, after commenting upon the case of *Harlem Gaslight Co. v. Mayor etc.*, 33 N. Y. 309, expressly disclaimed deciding whether the city might not have contracted for laying such pavement at its own expense, under its general municipal powers, which is really the question here presented. In view of the legislation which followed *Dean v. Charlton*, 23 Wis. 590, and the fact that it was decided by a divided court, and the general tenor of subsequent decisions,

and the further fact that patented methods and processes now enter so largely into various classes and kinds of public work, we are not disposed to extend the rule of that case beyond the particular point there decided. In *Hobart v. Detroit*, 17 Mich. 246, 97 Am. Dec. 185, and *Mots v. Detroit*, 18 Mich. 515, decided at about the same time, a contrary conclusion was reached; and in *Nicolson Pavement Co. v. Painter*, 35 Cal. 699, and *Burgess v. Jefferson*, 21 La. Ann. 143, the rule of the majority of the court in *Dean v. Charlton*, 23 Wis. 590, was sustained. Since then, in *In re Dugro*, 50 N. Y. 513, the question has been decided in conformity with *Hobart v. Detroit*, 17 Mich. 246, 97 Am. Dec. 185, and other like cases; and in *Yarnold v. Lawrence*, 15 Kan. 126, 131, *Brewer, J.*, notices the diversity of judicial opinion on the question, and is inclined to favor the views of the courts of Michigan and New York: *Baird v. Mayor etc.*, 96 N. Y. 567.

"In the present case there was a definite, well-settled price for the patent and specifications, at which it was held and offered to the city and all contractors, which would limit the recovery of the patentee, so that in fact there was free competition for the work and materials, and all else except the patent. The city had the benefit of all the competition of which the nature of the work admitted; and in such cases, where the entire work is done at the general expense of the city, the statute ought not to be so construed as to exclude the city from availing itself of desirable patented works or improvements, as to which there is but one price, and for which there can, in the nature of the case, be no competition, and when for performing the work and furnishing materials the advantage of competition is secured. While the rule of *Dean v. Charlton*, 23 Wis. 590, may be upheld as applied to assessments charged against abutting lots, where the lot owners have the right secured to them to construct in front of their property the improvements for or in which a ²³⁴ patented method or process is used, we cannot see that there is any good reason to hold that the statute applies to the patented mode or process, when in respect to all else the statutory requirement of competition is secured. Under any other theory a municipal corporation would be obliged to forego the purchase and use of all patented implements, modes, or processes—a result which we cannot think the legislature contemplated."

The case of *Mayor etc. v. Bonnell*, 57 N. J. L. 424, 51 Am. St. Rep. 609, is in point also.

The case of *In re Dugro*, 50 N. Y. 516, sustains the authority to use patented articles. In the opinion it was said: "Section 104 of the act is relied upon as a limitation upon the powers of the common council, to the extent of a prohibition to undertake any work, or order or direct the making or paving any street, in a manner or with a material which will not admit of competitive bids or proposals. It requires all work to be done and supplies to be furnished by contract when the expenditure will exceed one thousand dollars, and directs all contracts to be made or let after an advertisement for proposals, and to the lowest bidder. The statute was complied with, in that the proper officers of the city did advertise for bids or proposals for paving the street, and the contract was let to the only bidder, and at the price named in the bid. The objection is that the Nicolson pavement was patented, and the right to lay it was in a single person or corporation, and that, therefore, the advertisement being for bids to pave the street with that particular pavement, there could be no competition, and the form of advertising for and receiving bids, and acting upon them, was but a form, and was not, and could not be, a compliance with the act looking to competition; and it is claimed that the contract based upon the proceedings was void, and the assessment for the work therefore illegal.

"It is urged, because a statute prescribing general rules for the exercise of the powers granted to the municipal corporation are not, in all their detail, applicable to every case that may arise, that to the extent they cannot be applied, the powers are annulled and cannot be exercised. This would be to give undue effect to the act prescribing the forms of procedure, and modal in its character, at the ²³⁵ expense of the general grant of power. Whether the corporate authorities could or should have known that there could be no possible competition for the work (if such was the fact, which is not entirely certain), and, knowing that, could or should have made a contract without advertising for bids, need not be considered. There is no pretense of fraud, or that the contract, as made, was not a provident and proper contract, and reasonable and right in all its terms and provisions, so that the form of advertising and receiving bids cannot vitiate it, even if no such procedure was necessary. The general rule is—and this case does not form an exception—that statutes prescribing forms of procedure, and providing for the orderly conduct of proceedings by public officers or bodies, are only obligatory to the extent and in cases

to which they are by their terms applicable. The legislature cannot be presumed to have intended to declare that no power should be exercised, or work done, or supplies furnished, unless of a character that would admit of competitive bids. The grant of power was for public purposes, and the discretion vested in the common council was in the interests of the public; and neither the public nor the parties to be benefited by local improvements can be deprived of the benefit of this discretion, or the right to the best or most improved pavements, because full effect cannot in a particular case be given to an act designed for another purpose, to wit, to regulate the exercise of, and not to limit, the power. In other cases in this court a like statute intended to accomplish the same purpose—that is, the performance of work and the furnishing of supplies at the lowest price and on the most favorable terms—although sufficiently broad in its terms to include the contracts and the services in question, was held not applicable to, and therefore as not embracing, them: *People v. Flagg*, 17 N. Y. 584; *Harlem Gaslight Co. v. Mayor etc.*, 33 N. Y. 309.

“This case is not within the precise principle ruled in those cases, but it is quite analogous, and much of the reasoning of the judges who then spoke for the court is entirely applicable here. A thing within the letter is not within the statute unless within the intention. The act of 1870 can have full effect in cases to which it can be applied, but if there are cases to which it could not be reasonably applied, they are not within the intention, and therefore not within the statute. It seems to be absurd to ²³⁶ say that all powers and all authority is by necessary implication taken from the municipal authorities, except such as can be exercised in strict conformity to this one provision of law; that this section of the law of 1870 is to be the touchstone to determine the limit and extent of the powers vested in the common council, and that all other acts must conform to it. It should rather be interpreted with respect to the other statutes to which it is ancillary. The decisions of the courts in Wisconsin are adverse, while the Michigan courts are in accord with the views now expressed. If, as alleged, there could be no competition for the paving with the Nicolson pavement, the common council had nevertheless the power to cause the street to be paved with it; and it is simply a case not within the statute, although the words are broad enough to include it. It constitutes one of the necessary exceptions to it. No other question was presented upon this appeal; the counsel, in terms,

limiting the discussion to the operation and effect of the provisions of the act of 1870, requiring certain contracts to be given to the lowest bidder after an advertisement for proposals."

In *Fones Hardware Co. v. Erb*, 54 Ark. 651, the view entertained by Chief Justice Christiancy was approved. The Arkansas court said: "When a contract to build a bridge is to be let, there are two kinds of competition that may arise: 1. That between persons desiring to build different kinds of bridges; and 2. That between those desiring to build the same kind. And, as was said by Judge Christiancy in discussing a provision similar to that under consideration, the bidding which it contemplates is of the latter kind—bidding for the same particular thing, to be done according to the same specifications; for, says he, no bids for different kinds of work, and referring to different specifications, could be recognized as coming in competition with each other, for the purpose of determining the lowest bid, within the requirement of this section, without opening the door to the same corrupt combinations and furnishing facilities for the same fraudulent practices which it was the purpose of this provision to prevent: *Attorney General v. Detroit*, 26 Mich. 263."

This rule applied to patented articles should extend to any desirable article, although from the course of business ²³⁷ its manufacturers may have the exclusive sale of it. It is not a question of who makes or sells it, but of quality. In this case the complainants seek to apply a new regulation, viz., that in all such cases the city must be satisfied with some other article alleged to be equally good. They not only did not comply with the specifications, by naming one of the kinds of brick specified, but bid upon a brick the name of which was not divulged, and they now ask relief upon the ground that such a bid should have been considered. Municipal improvements afford an opportunity for corruption and jobbery, and the public opinion that it is not uncommon may be justified. This is perhaps unavoidable, but whether it is or not, we think the remedy is not that suggested, viz., to deprive the cities of the power to get what is desired, and compel them to take what is not wanted, or nothing. We think the law is complied with, in the absence of actual fraud or corruption, when specifications are submitted to competitive bidding, although some article is specified which, by reason of a patent or circumstances, is in the hands or under the control of a single dealer.

The decree will be reversed and the bill dismissed, with costs.

Grant, C. J., Moore and Long, JJ., concurred.

Montgomery, J., did not sit.

MUNICIPAL CORPORATIONS—PUBLIC CONTRACTS.—A city is not prohibited from contracting to lay Nicholson pavement by its charter, which provides that no contracts shall be made by the city, except with the lowest bidder, although the right to lay it is patented, and owned by a single individual, who was the only bidder: *Hobart v. Detroit*, 17 Mich. 248, 97 Am. Dec. 185. But see *Dean v. Charlton*, 23 Wis. 590, 99 Am. Dec. 205; *Fishburn v. Chicago*, 171 Ill. 338, 68 Am. St. Rep. 236.

McLAIN v. HOWALD.

[120 Michigan, 274.]

WILLS—CONSTRUCTION—CHILDREN.—A gift made by will, to take effect upon the termination of a life estate, of a specified sum to each of the children of a certain daughter of the testator, includes not only her children in being at the death of the testator, but also those born or in ventre sa mere prior to the death of the life tenant.

W. D. Fast, for the appellants.

S. D. Bishopp, for the appellees.

278 **HOOVER, J.** Samuel Helsel died leaving a will, as follows:

"That I, Samuel Helsel, of Amboy, Hillsdale Co., Michigan, being of sound mind and aged seventy-two years, do hereby make and declare this to be my last will and testament:

"First. In the event of my death, I give and bequeath to my wife during her natural life, or during her widowhood, all my real estate, wherever situated, to use, occupy, and have all of the benefit to be derived therefrom; also I hereby give or devise to my wife two horses and harness and wagon, and all farming tools, two cows, all household goods, to be stipulated same as the real estate; my wife to keep the farm and buildings in good repair and pay all taxes during her occupancy, as above stipulated.

"In the event of the death of my wife, or her remarrying, I hereby direct that my property shall be disposed of as follows, to wit:

"To my son Josiah's children, I hereby give or bequeath the sum of one hundred dollars.

"To my daughter Rebecca, I give one hundred dollars.

"To my daughter Elizabeth, I give one hundred dollars, to be divided between her two children equally.

"To my son Samuel Helsel's child, I give fifty dollars (child's name Elizabeth).

"To my daughter Catherine's two children, I give one hundred and fifty dollars each.

"To my daughter Mary Ann, I give to each of her children one hundred dollars.

"To my sons Elias and Jacob and to Edwin Spitler, I hereby give all the remainder of my estate, to be divided equally between them, share and share alike; and I hereby direct that all personal estate that I may die possessed of shall be disposed of and held until the event of the death or remarrying of my wife, and then divided as above stipulated, excepting that already mentioned and arranged for above in this will; the farm to be well taken care of, and no timber used or cut except what may be necessary for the use thereof, in keeping in repair."

Mary Ann Helsel had six children. Two were born before the testator's death, and these have been paid one hundred dollars each. Three were born after the testator's death, and before the death of the testator's widow, the life tenant, and one was born a few days after her death. The last ²⁷⁸ four claim to be entitled to the sum of one hundred dollars each, under the clause contained in the will, i. e., "to my daughter Mary Ann, I give to each of her children one hundred dollars"; and the bill is filed by them for a construction of the will.

It is contended that the intention that each child of Mary Ann who was then in existence, or who might be in existence, before the time fixed for distribution, should receive one hundred dollars is fairly deducible from the will. A cogent argument in support of this proposition is the following, taken from the brief of counsel: "Now, the question is, Did Mr. Helsel intend that the children who might be born after his death to Mary Ann, and before the period of distribution, should take, under his will, one hundred dollars each? We answer, 'Yes,' because he very clearly limited and designated the legatees in all of the preceding legacies, except the one to Josiah's children, to whom he gave one hundred dollars. In all the other bequests he absolutely limited the gift to the number designated and the child named. He went so far as to mention the name of the child of his son Samuel Helsel. And from this we conclude that he intended all of the children of Mary Ann in being at the period of dis-

tribution should take under this clause, in view of the fact that he had postponed the time of enjoyment of the legacies till the event of the remarrying or death of his widow. . . . Edward L. McLain was born in the same month the life tenant died. In law, a child is considered born, for all beneficial purposes, while in the mother's womb. . . . Therefore he takes as well as the others, under this clause."

While it cannot be disputed that it is the policy of the law to treat estates and rights in property as vested, when practicable (see *Doe v. Considine*, 6 Wall. 458), there are cases where such rights must give way in favor of other persons. "Thus, where a gift to a class is to take effect after the testator's death, the estate given will be cut down by the birth of others who come within the description before the period or event upon which the gift is to take effect or the distribution is to be made; such will be included as within the probable intention of the ²⁷⁷ testator." In *McArthur v. Scott*, 113 U. S. 340, a gift to grandchildren was held to include any grandchild of the testator who might be born after the testator's death, and before the time of distribution fixed by the will. See, also, *Doe v. Considine*, 6 Wall. 458, where it is held that although the estate be vested under the devise, to take effect in enjoyment at a future period, the estate vests in persons as they come in esse, subject to opening and letting in others as they are born afterward. In the case of *Hall v. Hall*, 123 Mass. 124, it was said: "It is a testamentary gift to a class of persons, which is made by the testator to take effect at a period beyond the time of his death; and the general rule applies that those who come within the description before the period or event upon which the gift is to take effect or the distribution is to be made will be included as within the probable intention of the testator": *Fosdick v. Fosdick*, 6 Allen, 41; *Worcester v. Worcester*, 101 Mass. 128; *Hatfield v. Sohler*, 114 Mass. 48.

In the case quoted from, the court were of the opinion that the grandchildren took contingent interests, which did not immediately vest; but as we have seen from the case of *Doe v. Considine*, 6 Wall. 458, the same result would be reached if it were otherwise.

In *Worcester v. Worcester*, 101 Mass. 128, it was said: "When it [a testamentary gift] is postponed beyond the time of his [the testator's] death, then those who come within the description before the period or event upon which the gift is to take

effect or the distribution is to be made will ordinarily be included as within the probable intention of the testator."

There is a class of cases which hold that, when a construction of the will that will let in children who are born after the death of the testator has the effect to defer the distribution of the estate, it should not be indulged, and in such cases those children will not be considered within the testator's intention. *Ringrose v. Branham*, 2 Cox Eq. Cas. 384, is such a case, and children born after the testator's death were excluded because, inasmuch ²⁷⁹ as each additional child increased the amount to be taken from the estate under the provision in question, the distribution of the testator's personal estate would have to be postponed until the amount of such legacies could be so ascertained. That case distinguished the case of *Gilmore v. Severn*, 1 Brown Ch. 582, where the amount of the fund was fixed, and was not dependent upon the number of beneficiaries. *Storrs v. Benbow*, 2 Mylne & K. 46, supports this doctrine; also, *Butler v. Lowe*, 10 Sim. 323.

But in all of these cases the birth of the claimant occurred after the period fixed for distribution, so we need not conclude from them that the death of the testator necessarily determines the rights of the children. If the right to have the property distributed at once existed, such would be the rule; but if such right was definitely and certainly fixed by a subsequent date or contingency, the rule might be different, because, until that time arrived, the effect of letting after-born children in would not be to postpone the date of distribution. Hence, such cases are not within the rule, because not within the reason of the rule. Accordingly, we have cases which, at first blush, might seem at variance with this principle, but which are not, because of the deferred time for distribution. In *Mann v. Thompson, Kay*, 645, the time was indefinite. The case of *Myers v. Myers*, 2 McCord Eq. 214, 16 Am. Dec. 648, contains a discussion of this distinction. In short, until the time for distribution arrives, unborn children are in the same position, when the gross amount of the legacies depends upon the number of legatees, as they are where a gross sum is bequeathed, and the aliquot parts are to depend upon an indefinite number of legatees. The right of the unborn to a portion of such a fund is recognized in *Knorr v. Millard*, 57 Mich. 268. We are therefore of the opinion that the court erred in dismissing the complainants' bill, as we think the three children who were born before their grandmother died were entitled to take under the will.

Can the same be said of the fourth, who was born after ²⁷⁹ the death of the widow? She died March 4th, and the child Edward was born before April 1st of the same year. For all purposes of construction, a child en ventre sa mere is considered as a child in esse, if it will be for its benefit to be so considered. This rule was established in *Doe v. Clarke*, 2 H. Black. 399. In *Clarke v. Blake*, 2 Ves. Jr. 673, it was held that, under a devise to all of the children of A except B, a posthumous child was entitled to take: See, also, *Pierson v. Garnet*, 2 Brown Ch. 47; *Cooper v. Forbes*, 2 Brown Ch. 63; *Freemantle v. Freeman-tle*, 1 Cox Eq. Cas. 248. "The child en ventre is supposed to be actually born at the period of distribution": See, also, *Mogg v. Mogg*, 1 Mer. 654; *Rawlins v. Rawlins*, 2 Cox Eq. Cas. 425. 10 American and English Encyclopedia of Law, 624, treats such children as in esse, citing numerous authorities in support of the text. This is in accord with our own statutes: 2 Howell's Statutes, sec. 5546, 5784, 5809, 5847; *Chambers v. Shaw*, 52 Mich. 21; *Catholic Ben. Assn. v. Firnane*, 50 Mich. 82. It may be that these statutes do not in terms cover this case, but they are in harmony with the settled rule when they declare that "posthumous children are considered as living at the death of their parents": 2 Howell's Statutes, sec. 5784. And it is held that such children may sue for an injury or loss sustained while en ventre sa mere: 27 Am. & Eng. Ency. of Law, 420, and note. We feel justified by these authorities in saying that Edward McLain, being in esse, though en ventre sa mere, at the time of the death of the life tenant, was entitled to take under the will with his older brothers and sisters.

It follows that the decree must be reversed and a decree entered in this court in accordance with the prayer of the bill; costs of both courts to be paid out of the estate.

The other justices concurred.

WILLS—CHILDREN, WHO INCLUDED UNDER.—Where a particular estate or interest is carved out, with a gift over to the children of the person taking that interest, or the children of any other person, such gift will embrace not only the persons living at the death of the testator, but all who subsequently may come into existence prior to the period of distribution: See the monographic note to *Thomas v. Thomas*, 73 Am. St. Rep. 416-420.

WILLS—CHILDREN EN VENTRE.—Under a devise to all the children of a certain person, a posthumous child is entitled to take; and under a gift to A and all his children living at his death, a child born seven months after his death may take: See the monographic note to *Thomas v. Thomas*, 73 Am. St. Rep. 415.

SMALLEY v. BODINUS.

[120 Michigan, 363.]

NOTARY PUBLIC — AFFIDAVIT — ADMINISTERING OATH TO COPARTNER.—A notary public is without authority to administer an oath to an affidavit when the affiant is his copartner and the matter is one in which the firm is interested.

Walker & Spalding, for the appellants.

S. J. Colby, H. Geer, and J. H. Cole, for the appellee.

³⁶³ **HOOKER, J.** Edwin E. Smalley and De Witt C. Spaulding were copartners, and, as such, had a claim for lumber furnished by them to one Gardner, who put it into a house belonging to the defendant, upon which it is sought by this proceeding to enforce a lien. The statement of the lien which was filed appears to have been signed and sworn to by Smalley before Spaulding, his copartner, and the defendant claims that this rendered the statement invalid, upon the principle that the interest of Spaulding disqualified him from acting in the premises, and the statement is the same as if it had not been verified. It is urged that the statute confers authority on any notary to administer oaths, and we are cited to some cases where this court has held that an oath may be administered by a solicitor of ³⁶⁴ the affiant. But that presents a somewhat different question, as in that case the attorney cannot be said to be an interested party, while here the copartner clearly is so. But in that case the legislature expressed its disapproval of the practice by forbidding it soon after the decisions were filed. We have held that an acknowledgment of a deed taken by the grantee is void: *Groesbeck v. Seeley*, 13 Mich. 329; *Laprad v. Sherwood*, 79 Mich. 524. Counsel cite cases from other states supporting this proposition. It may be possible to draw a distinction between an acknowledgment and an affidavit; but it seems to us that the same reason forbids official action by one who is to be benefited in both cases. Perhaps no great hardship would result should this affidavit be held valid, inasmuch as it has in no way misled anyone, and furthermore states the truth; but the rule, once established, would be applicable to other affidavits, where the dangers of the practice would be more apparent.

The decree of the circuit court is reversed and the bill dismissed, with costs of both courts.

The other justices concurred.

NOTARIES, WHETHER INTEREST DISQUALIFIES.—The attorney at law of a mortgagee is not incompetent as a notary public to attest the execution of the mortgage: *Jones v. Howard*, 90 Ga. 451, 59 Am. St. Rep. 231. And an acknowledgment of a mortgage is not rendered invalid by the fact that the officer before whom it is made negotiated the loan secured thereby, and was a partner of the mortgagor, there being no evidence that he was a party in interest: See the monographic note to *Cooper v. Hamilton*, 56 Am. St. Rep. 802. However, it seems that when a notary is a party in interest, he is disqualified to take the acknowledgment to any writing: Note to *Wilkowski v. Halle*, 95 Am. Dec. 378.

WEIDMAN v. SYMES.

[120 Michigan, 657.]

NEGOTIABLE INSTRUMENTS — RIGHT OF TRANSFeree TO FILL BLANKS.—If the maker delivers a negotiable instrument containing blank spaces intended to be filled, the transferee has implied power to complete the instrument by filling the blanks in the way contemplated by the maker, and the latter is thereafter liable to a bona fide holder without notice.

NEGOTIABLE INSTRUMENTS—FILLING BLANKS—LIABILITY OF MAKER.—If the maker of a note fills in all the blanks upon a printed form except the one intended for the rate of interest, and that is thereafter filled by his transferee without his knowledge, he is liable to a bona fide holder without notice.

S. S. Miner, for the appellant.

Watson & Chapman, for the appellee.

⁶⁵⁷ **LONG, J.** This case was in this court at the April term, 1898. It is reported in 116 Mich. 619. On the trial of the case in the court below from which that appeal was taken, the defendant had judgment. The case was reversed in this court, and remanded for a new trial. The new trial has been had, and judgment has again passed for defendant, under the direction of the court, and plaintiff brings error.

It appeared that on September 27, 1890, one John McBride borrowed of plaintiff one hundred dollars, and gave the note in question as security, with the defendant as joint maker. The note was drawn up by defendant and signed by him in the Exchange Hotel, in Owosso. He handed it to McBride, who

took it to the plaintiff, who was only a short distance away, and received from plaintiff one hundred dollars. The ⁶³⁹ defendant testified that, at the time he signed the note, no interest was stated in it. The note was put in evidence, and appears upon its face to draw ten per cent. There were two blank spaces, and one is filled with the words "ten (10) per cent," and the other with the figures "10," indicating ten per cent. The plaintiff testified that, when he received the note, these spaces were filled as the note now appears, and that there was nothing on its face to indicate that it had been altered or changed; that about three months before this suit was commenced, he met the defendant, and informed him that the note had not been paid, when defendant asked him if the interest had been paid, and said he would see McBride in regard to the note; that the interest had been paid upon the note each year until about the time suit was commenced. McBride was not called as a witness. The plaintiff further testified that, on the trial in the justice's court, defendant testified that when he drew the note and handed it to McBride, he left the interest spaces unfilled, and knew that McBride was to get the money on it from the plaintiff.

At the close of the testimony the plaintiff asked the court to charge the jury: "In this case, it appears from the undisputed evidence that defendant drew and signed the note in question, except the words 'ten (10) per cent,' and also the figures '10,' which spaces he permitted to remain in blank; that the note was then handed to the other maker of the note, John McBride, who took it and delivered it to plaintiff, and received the full amount of the note, one hundred dollars; and that at the time it was delivered to plaintiff the blank spaces had been filled by writing in the words 'ten (10) per cent' and the figures '10.' This being true, the defendant would be guilty of negligence; and it appearing that the plaintiff did not know that the note had been changed since Symes had signed it—there being nothing upon the face of said note to indicate that the note had been changed—the plaintiff would be a bona fide holder, and would be entitled to recover the amount of the note at the present time."

This request was refused and the court directed the ⁶³⁹ verdict in favor of defendant. Counsel for plaintiff contends that the rule is that, where one delivers a writing containing blank spaces meant to be filled, the transferee, at least in the case of negotiable paper, has implied authority to complete the in-

strument by filling the blanks, in the way contemplated by the maker, with matter in general conformity to the character of the instrument.

This request should have been given. The rule is laid down by 2 Daniel on Negotiable Instruments, section 1405, that: "There is a general principle which pervades the universal law merchant, respecting alterations—a principle necessary to the protection of the innocent and prudent from the negligence and fraud of others. That is that when the drawer of the bill or the maker of the note has himself, by careless execution of the instrument, left room for any alteration to be made, either by insertion or erasure, without defacing it or exciting the suspicions of a careful man, he will be liable upon it to any bona fide holder without notice, when the opportunity which he has afforded has been embraced, and the instrument filled up with a larger amount or different terms than those which it bore at the time he signed it. The true principle applicable to such cases is that the party who puts his paper in circulation invites the public to receive it of anyone having it in possession with apparent title, and he is estopped to urge an actual defect in that which, through his act, ostensibly has none. . . . The inspection of the paper itself furnishes the only criterion by which a stranger to whom it is offered can test its character, and, when the inspection reveals nothing to arouse the suspicions of a prudent man, he will not be permitted to suffer when there has been an actual alteration": See, also, *Garrard v. Haddan*, 67 Pa. St. 82, 5 Am. Rep. 412; *Visher v. Webster*, 8 Cal. 109; *Rainbolt v. Eddy*, 34 Iowa, 440, 11 Am. Rep. 152; *Harvey v. Smith*, 55 Ill. 224—all of them holding to the rule laid down in Daniel on Negotiable Instruments.

The note in suit reads, as defendant claims it was drawn and left his hands, as follows:

"Owosso, Sept. 27, 1890.

"On or before one year after date, I promise to pay to
the order of William Weidman one hundred dollars at
——. Value received, with interest at —— per cent per annum.

(Signed) "JOHN McBRIDE.

"GEO. B. SYMES."

As the note was produced on the trial, it appeared that the first blank space was filled by words and figures as follows: "Ten (10) per cent," and the second blank space by the figures "10." The plaintiff may well have been deceived when the

note was handed him by McBride with the blank spaces so filled. The defendant was negligent in leaving these spaces blank. The note was a printed one, except the date, date of payment, name of payee, and amount. The rule contended for should have been applied by the court. The learned judge in his charge to the jury, however, seemed to think that the cases of *Holmes v. Trumper*, 22 Mich. 427, 7 Am. Rep. 661, *Miller v. Finley*, 26 Mich. 249, 12 Am. Rep. 306, and *Bradley v. Mann*, 37 Mich. 1, laid down a different rule. In this the court was in error. In *Holmes v. Trumper*, 22 Mich. 427, 7 Am. Rep. 661, there was no blank space left to be filled. The words "10 per cent" were added at the end of the note. In *Miller v. Finley*, 26 Mich. 249, 12 Am. Rep. 306, the alteration was by procuring another signer to the note. And in *Bradley v. Mann*, 37 Mich. 1, the words "with interest at 10 per cent" were added at the end of the note, after the words "Value received."

The court was also in error in directing the verdict in favor of defendant. It is true that the defendant testified that these spaces were not filled when the note left his hands, yet there were circumstances surrounding the case from which the jury might find that the defendant was mistaken in this. He knew that McBride was negotiating a loan with the plaintiff, and that this note was given as security for it. When the plaintiff was pressing for payment, it is claimed that he asked if the interest had been paid upon it. If this is correct, it might raise a question in the minds of the jury whether the spaces were not filled at the time the note left defendant's hands, or whether the ⁶⁶¹ filling in of the spaces was not authorized by him. This was a question for the jury, as we held in the former opinion.

The judgment must be reversed and a new trial ordered.

The other justices concurred.

NEGOTIABLE INSTRUMENTS EXECUTED IN BLANK and intrusted by the maker to another carry on their face the implied authority to fill up the blanks, and perfect the paper in conformity with the apparent object of the blanks; and the maker cannot complain, as against a bona fide holder, that the person to whom he intrusted the paper violated the confidence reposed in him: See the monographic note to *Bedell v. Herring*, 11 Am. St. Rep. 316. So, where a blank left in a promissory note is filled with the rate of interest, this does not avoid the note in the hands of a bona fide holder: *Extended note to Draper v. Wood*, 17 Am. Rep. 103. But see the note to *Fordyce v. Kosminski*, 4 Am. St. Rep. 25, 26; *Conger v. Crabtree*, 88 Iowa, 536, 45 Am. St. Rep. 249.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

THEOPOLD v. DEIKE.

[76 Minnesota, 121.]

ALTERATION OF INSTRUMENTS—WHAT IS NOT.—An erasure, by the holder of a promissory note, of an indorsement of payment thereon, although fraudulently made, is not such an alteration of the note as will avoid it, because such an indorsement is no part of the contract evidenced by the original note.

EVIDENCE—PAROL.—A MEMORANDUM OF A PARTIAL PAYMENT INDORSED by the holder on the back of a promissory note is a mere acknowledgment, in the nature of a receipt of payment, which is open to contradiction or explanation by parol.

Action upon a note. A judgment was entered in pursuance of an order granting a motion for judgment on the pleadings in favor of the plaintiff, and the defendant appealed.

Thomas H. Quinn, for the appellant.

A. D. Keyes, for the respondent.

¹²¹ **MITCHELL, J.** Action upon a promissory note executed by the defendants to the plaintiff on November 14, 1893, and payable in ninety days. The facts alleged in the answer are that on January 30, 1894, the defendants paid plaintiff upon the note the sum of one hundred and forty-eight dollars and twelve cents, which plaintiff indorsed on the note as a payment thereon; that subsequently the plaintiff, for the purpose of cheating and defrauding the defendants, erased this indorsement of payment from the note, so that it ¹²² does not now appear thereon, and then brought this action to recover the full amount of the note.

The contention of the defendants is that this erasure of the indorsement of the payment constituted a fraudulent material alteration of the instrument in the sense of a mutilation of the note, which avoided it as to all parties not consenting to it. The point is without merit.

To constitute a mutilation of a note or other contract which will avoid it, there must be some change or alteration in the writing constituting the evidence of the contract so as to make it another and different instrument, and no longer evidence of the contract which the parties made. The ground upon which the doctrine rests is that such an alteration avoids the instrument; that it destroys the identity of the contract. A memorandum of a payment indorsed by the holder on the back of a promissory note is no part of the contract of the parties. The original note, which constituted the evidence of their contract, remains intact. The memorandum of payment is merely evidence against the holder of the fact of the payment, and is of no more effect than if made on a separate piece of paper: *Cambridge Sav. Bank v. Hyde*, 131 Mass. 77, 41 Am. Rep. 193. Writing on the back of an instrument may be such as to form a part of the contract itself, and in such a case an alteration of the indorsement would constitute an alteration of the written evidence of the contract of the parties; but a memorandum of a partial payment indorsed by the holder on the back of a promissory note is not of this character. It is neither a contract nor any part of a contract, but a mere acknowledgment, in the nature of a receipt of payment, which is open to contradiction or explanation by parol: *Sears v. Wempner*, 27 Minn. 351.

Judgment affirmed.

AN ALTERATION OF AN INSTRUMENT, which does not change its legal effect, does not vitiate it as to a party who does not consent: *Note to Aubuchon v. McKnight*, 13 Am. Dec. 502. Words written on the back of a note are prima facie no part of the contract: *Note to Palmer v. Largent*, 25 Am. Rep. 493.

PAROL EVIDENCE IS ADMISSIBLE TO EXPLAIN A RECEIPT: *Bulwinkle v. Cramer*, 27 S. C. 376, 13 Am. St. Rep. 645; *McKinney v. Harvie*, 38 Minn. 18, 8 Am. St. Rep. 640.

MINNEAPOLIS SASH AND DOOR COMPANY v. METROPOLITAN BANK.

[76 Minnesota, 136.]

BANKS—DUTY OF, AS COLLECTION AGENTS — EMPLOYMENT OF SUBAGENT.—For the purposes of collection, a collecting bank must employ a suitable subagent, when a subagent is necessary. It must not transmit a check, payable at a distant place, directly to the bank by which payment is to be made, with the request that a remittance be made therefor, as no one can be deemed a suitable agent to enforce, in behalf of another, a claim against himself.

BANKS—NEGLIGENCE IN SELECTING COLLECTING AGENT—NOTICE.—A bank receiving a check upon another bank for collection in a distant place cannot, where loss ensues, justify or excuse its negligence in selecting the drawee of the check as a subagent for its collection by a notice printed upon the plaintiff's pass-book, in which the bank declares that, in receiving checks or drafts on deposit, or for collection, it acts only as agent for its customer, and that "when forwarding items to other points, we select agents who are responsible according to our judgment and means of knowledge, but we assume no risk or responsibility on account of their omissions, negligence, or failure, should any occur."

BANKS—NEGLIGENCE IN SELECTING COLLECTING AGENT—USAGE AND CUSTOM.—A bank receiving a check upon another bank for collection, in a distant place, cannot, where loss ensues, justify or excuse its negligence in selecting the drawee of the check as a subagent for its collection by showing that it is usual and customary for banks to send checks and drafts, payable by other banks at distant points, to the drawee directly, by mail, provided there is no other bank of good standing in the same town. Usage and custom do not justify negligence.

BANKS—NEGLIGENCE IN SELECTING COLLECTING AGENT—RESULT.—A bank receiving for collection a check payable by another bank at a distant point cannot, in case of nonpayment, escape liability for its negligence in sending the check directly to the drawee, by showing that the result would have been the same had a third party been selected to present the check.

Action to recover damages for the negligence of the defendant in failing to collect a check left with it on July 29, 1896, for such purpose. It was drawn by one J. K. Norton on the Mapleton Bank of Mapleton, Minnesota, and payable to the plaintiff's order. This was the only bank in Mapleton. The defendant, on the same day, sent the check, by mail, to the Mapleton Bank for collection and payment. This bank postponed a remittance for three days and then sent a draft to the defendant, drawn on the National Citizens' Bank of Mankato, Minnesota, which was received by the defendant on August 5, 1896. This draft was sent by the defendant to the Merchants' National Bank of St. Paul, Minnesota, for collec-

tion. On August 15, 1896, the Mapleton Bank suspended payment, and on August 20, 1896, the defendant bank was notified of the dishonor of the draft. A notice, stated in the second section of syllabus, *supra*, was printed on the plaintiff's pass-book, and the custom stated in the opinion was shown. The court found that, in opening an account with the defendant and becoming a regular customer, the plaintiff assented to the terms and conditions of the notice to customers, thus forming a valid and binding agreement between the parties; that the custom mentioned was valid and binding on the parties; that they contracted with reference thereto; and that the defendant was not negligent, but was entitled to judgment. The plaintiff appealed.

Penney & McMillan, for the appellant.

John T. Baxter, for the respondent.

¹⁴² COLLINS, J. On the admitted facts in this case, the only question necessarily to be determined, in our opinion, is whether defendant bank, doing business at Minneapolis, was negligent when it sent by mail, and for collection, the Norton check directly to the bank of Mapleton, one hundred and seventeen miles distant, upon which bank the check was drawn, loss having resulted by reason of the adoption of this method of presenting the paper for payment. The defendant seeks to justify its procedure upon the ground that it had restricted its liability to its depositors, when collecting checks and drafts, by means of the notice printed upon its depositors' bank or pass books, of which notice plaintiff's secretary had actual knowledge; and also because of a well-settled usage and custom then prevailing in banks; and, further, because the same result would have ensued had another correspondent been selected.

1. Although the defendant had limited its liability so that when ¹⁴³ receiving checks or drafts for collection, or on deposit, it acted as an agent only in forwarding these items to other points for collection, it was only bound to select agents who were responsible, according to its judgment and means of knowledge, and assumed no risk or responsibility on account of their omission or neglect or failure, defendant was obliged to exercise reasonable care and diligence, in adopting a method of presenting the check in question to its drawee for payment, in selecting its agent. Now, can it be held that defendant exercised reasonable care when it sent the check by mail to the

very party most interested against the payee and principal, thus placing such principal entirely in the hands of its adversary. Norton had ample funds on deposit when he drew the check, and also when the check reached the drawee, presumably on July 31st, at the opening of business hours. It was important that it should speedily be presented for payment, in order to fix his liability in case of nonpayment. This was of the utmost importance to both payee and maker, in order that the interests of each might be protected. The interest of the drawee would naturally be to procrastinate, and possibly this would be its inclination. It seems to be settled by all of the authorities that: "For the purposes of collection, the collecting bank must employ a suitable subagent. It must not transmit its checks or bills directly to the bank or party by whom payment is to be made, with the request that remittances be made therefor. It is considered that no firm, bank, corporation, or individual can be deemed a suitable agent, in contemplation of law, to enforce, in behalf of another, a claim against itself": 1 Daniel on Negotiable Instruments, sec. 328a; 3 Am. & Eng. Ency. of Law, 2d ed., 809; Drovers' Nat. Bank v. Anglo-American Packing etc. Co., 117 Ill. 100, 57 Am. Rep. 855; Merchants' Nat. Bank v. Goodman, 109 Pa. St. 422, 58 Am. Rep. 728; Wagner v. Crook, 167 Pa. St. 259, 46 Am. St. Rep. 672; German Nat. Bank v. Burns, 12 Colo. 539; Anderson v. Rodgers, 53 Kan. 542; 27 L. R. Ann. 248, and note, in which the authorities are carefully considered.

The truth of the remark as to the unsuitability of the drawee of a check as the agent selected to enforce its collection, and what may be expected if the practice is upheld, is well illustrated by the facts now before us. As before stated, the check must, in due course of mail, have reached Mapleton on the morning of July 31st. Had it been in the hands of a properly designated third party, it would ¹⁴⁴ have been presented and paid that day. The proceeds would, if properly transmitted, have reached defendant on the morning of August 1st or 2d. Even if the payment had then been made, as it finally was, in a check upon the Mankato bank, and defendant had pursued the course it did as to its collection, no loss would have resulted. But instead of accounting for the Norton check, so that defendant would receive the proceeds as early as August 2d, the Mankato check was made out on August 4th, and came to defendant's hands the next day. With sufficient funds in its hands to meet the check, the Mapleton bank postponed

a remittance for three days, and then sent a check, which proved to be worthless when seasonably presented for payment.

2. We have stated the grounds upon which defendant attempts to justify. It did show that it was usual and customary for banks to send checks and drafts, payable by other banks at distant points, to the drawee direct, and by mail, provided there was no other bank of good standing in the same town, while plaintiff was allowed to prove that an express company, whose business it was to collect and transmit money, had offices in both places. We fail to see what possible effect upon a case of this kind the fact that the drawee is the only bank in good standing in the town can have upon the duty of a bank which undertakes a collection. Any reason for such a course is equally as sound where there are two or more banks in the town as where there happens to be but one. While the syllabus of one of the cases cited in support of counsel's proposition (*Western v. Sadilek*, 50 Neb. 105, 61 Am. St. Rep. 550) may justify him, the opinion does not.

We cannot agree with counsel that the usage and custom here relied upon is a defense to the claim that defendant was negligent when forwarding this check to the Mapleton Bank for presentation and payment. As a general rule, usage and custom will not justify negligence. It may be admitted that such a course is frequently adopted, but it must be at the risk of the sender, who transmits the evidence of indebtedness upon which the right to demand payment depends to the party who is to make the payment. Such a usage and custom is opposed to the policy of the law, unreasonable and invalid. It was so decided in *Drovers' Nat. Bank v. Anglo-American Packing etc. Co.*, 117 Ill. 100, 57 Am. Rep. 855, and *Merchants' Nat. Bank v. Goodman*, 109 Pa. St. 422, 58 Am. Rep. 728. Counsel for defendant has cited two cases from the English Law Reports and three from the New York court of appeals as authority upon this question. An examination of these cases will show that this exact question was not decided: See *Anderson v. Rodgers*, 27 L. R. Ann. 248, note, *supra*.

3. Counsel for defendant also urge that plaintiff ought not to recover, because the result would have been the same had another correspondent been selected to present the check. This assumes that a third party would have waited until August 4th for payment, and then would have accepted a check upon the Mankato bank as payment, which would have been transmitted to defendant August 5th. Such an assumption reflects

seriously upon the ordinary methods of bank officers, and is without foundation. Primarily, the loss to plaintiff grew out of the fact that defendant negligently selected an unsuitable party, the payee, to present the check, to compel payment, or, in case of refusal, to protect its rights, as against Norton, by due protest and notice of nonpayment. We need not discuss the further contention that payment of the Norton check could only be made in money.

The order refusing a new trial is reversed, and, on the findings of fact, judgment must be ordered in plaintiff's favor in the court below, unless such court, in its discretion, grants a new trial.

START, C. J., dissenting. I dissent. Under the undisputed evidence in this case, as to the universal custom of banks in collecting paper drawn upon a bank in good standing, which is the only bank at the place of its location, it cannot, in my opinion, be held, as a matter of law, negligence for the collecting bank to send the paper to the drawee bank for collection.

Duties of Banks Acting as Collecting Agents.*

Authority to Collect—Agency.—The purpose of this note is not to discuss the general authority, rights, powers, or liability of banks as collecting agents, but to give a view of those positive duties imposed upon them in the business of making collections for customers. A bank's authority to collect commercial paper for its patrons need not be expressed in its charter, for it is necessarily implied from the character of a general banking business: *Keyes v. Bank*, 52 Mo. App. 323; and the business of collecting commercial paper is a part of the regular business of banking when carried on under national as well as under other bank charters: *Mound City Paint etc. Co. v. Commercial Nat. Bank*, 4 Utah, 353, 354. See, also, *Exchange Nat. Bank v. Third Nat. Bank*, 112 U. S. 276; *Yerkes v. National Bank*, 60 N. Y. 338, 25 Am. Rep. 208. When commercial paper is delivered to a banker for collection, the banker becomes the customer's agent to make collection, and he undertakes the duty of an agent for all the purposes of making the collection: *First Nat. Bank v. Bank of Monroe*, 33 Fed. Rep. 408, 411; *McCulloch v. Commercial Bank*, 16 La. 566; *Ward v. Smith*, 7 Wall. 447, 451. The mere fact that a collecting bank credits a customer with a check, deposited for collection, as cash does not alter the relation between the parties: *Hazlett v. Commercial Nat. Bank*, 132 Pa. St. 118, 125. When a note or draft is sent by one individual or bank

*REFERENCE TO MONOGRAPHIC NOTES.

Liability of bank as agent for collection: 34 Am. Dec. 307-317.

Care required of bankers acting as agents or bailees: 38 Am. St. Rep. 773-788.

to another for collection, and to remit the proceeds to the sender, the relation of principal and agent is created, and not that of debtor and creditor: *Midland Nat. Bank v. Brightwell*, 148 Mo. 358, 71 Am. St. Rep. 608. A bank intrusted with the apparent ownership of a note for purposes of collection stands on the ordinary footing of an agent and is not liable to its principal if it acts in good faith, according to the regular and accustomed course of business, though not to the best advantage: *Bellemire v. Bank of United States*, 4 Whart. 105, 33 Am. Dec. 46. A collecting bank is the agent of the holder of a note intrusted to it for collection, and in no sense the agent of the maker: *Dodge v. Freedman's etc. Trust Co.*, 98 U. S. 379, 385; and where an instrument payable at a bank named is lodged with that bank for collection, the bank becomes the agent of the payee to receive payment: *Ward v. Smith*, 7 Wall. 447; but merely making a note payable at a certain bank does not, of itself, constitute such bank the agent of the payee to receive the money: *Caldwell v. Evans*, 5 Bush, 380, 96 Am. Dec. 358; *Grissom v. Commercial Nat. Bank*, 87 Tenn. 350, 378, 10 Am. St. Rep. 669, 686.

Title to Paper.—A bank secures no title to an instrument intrusted to it for collection. It has no right to hold the paper in any other capacity than as agent, and title thereto remains in the customer: *National Bank v. Johnson*, 6 N. Dak. 180, 184; *Griffin v. Chase*, 36 Neb. 323; *Prescott v. Leonard*, 32 Kan. 142; *Yerkes v. National Bank*, 60 N. Y. 383, 25 Am. Rep. 208; *Dickerson v. Wason*, 47 N. Y. 439, 7 Am. Rep. 455; *Fuller v. Bennett*, 55 Mich. 357; *Balbach v. Frelinghuysen*, 15 Fed. Rep. 675; *Richardson v. Denegre*, 93 Fed. Rep. 572. Nor does an indorsement "for collection" transfer title to the paper. Such an indorsement is only intended to put the paper in such shape that the bank may collect, and not to thereby pass the title to the bank: *Balbach v. Frelinghuysen*, 15 Fed. Rep. 675; *National Bank v. Johnson*, 6 N. Dak. 180; *Tyson v. Western Nat. Bank*, 77 Md. 412. By indorsing it for collection and credit, the owner "notifies the whole world that he has not parted with his title to the paper; that whoever may secure possession of it in the course of its transmission from bank to bank in the process of making the collection, according to the usages of banks, will hold it as his property; and that it cannot, therefore, be treated as the property of any other person": *National Bank v. Johnson*, 6 N. Dak. 180, 184. An indorsement "for collection" is notice that the possession of the bank is that of agent and not of owner: *Commercial Bank v. Armstrong*, 148 U. S. 50, 51; *First Nat. Bank v. Bank of Monroe*, 33 Fed. Rep. 408. Title to commercial paper received for collection by a bank and forwarded to its correspondent in the usual course of business, without any express agreement in reference thereto, does not vest in such correspondent, even if it has remitted upon the general account in anticipation of collec-

tions. Title passes only by a contract to that effect, either expressly proved or inferred from an unequivocal course of dealing: *National Park Bank v. Seaboard Bank*, 114 N. Y. 28, 11 Am. St. Rep. 612; note to *First Nat. Bank v. Strauss*, 14 Am. St. Rep. 585; *Dickerson v. Wason*, 47 N. Y. 439, 7 Am. Rep. 455. A bank is not authorized to sell a note left with it for collection: *Fuller v. Bennett*, 55 Mich. 357. Property in checks deposited in a bank for collection remains in the customer until they are collected: *Balbach v. Frellinghuysen*, 15 Fed. Rep. 675. Hence, if at the time of such deposit, the bank is insolvent, which fact is or ought to be known to its officers, and the checks are not paid when the bank closes its doors, they are still the property of the depositor, and may be recovered by him from the receiver, for the action of the bank in receiving the checks for collection, under such circumstances, is a fraud upon the customer: *Richardson v. Denegre*, 93 Fed. Rep. 572.

General Duty.—The general rule as to the duty of a collecting bank is, that it is bound to use all reasonable diligence to protect the interests of the holder of the property: Note to *Isham v. Post*, 38 Am. St. Rep. 775, treating of the care required of bankers acting as agents or bailees. But, so long as it assumes no other duty than the due presentment of paper, and so long as it discharges that duty and is guilty of no misrepresentation or fraudulent concealment, it is not forbidden to obtain security, in good faith, for a claim in its own behalf against the debtor: *United States Nat. Bank v. Westervelt*, 55 Neb. 424, 429. It does not, by accepting drafts for collection, waive its right to collect its own claims against the drawee. It may, therefore, obtain priority by attachment for its own claims: *Freeman v. Citizens' Nat. Bank*, 78 Iowa, 150, 153.

A collecting bank "must use due diligence in taking all such steps by presentment, demand, protest, and notice as are necessary to fix the liability of all parties to whom its principal has the right to resort for payment": Note to *Allen v. Merchants' Bank*, 34 Am. Dec. 308; *Baldwin v. Bank of Louisiana*, 1 La. Ann. 13, 45 Am. Dec. 72; *German Nat. Bank v. Burns*, 12 Colo. 539, 13 Am. St. Rep. 247; *First Nat. Bank v. Fourth Nat. Bank*, 77 N. Y. 320, 33 Am. Rep. 618; *Montgomery Co. Bank v. Albany City Bank*, 7 N. Y. 459; *Bank of Mobile v. Huggins*, 3 Ala. 206; *McKinster v. Bank of Utica*, 9 Wend. 46; *Warren Bank v. Suffolk Bank*, 10 Cush. 582, 585; *Merchants' etc. Bank v. Stafford Nat. Bank*, 44 Conn. 564; *West v. St. Paul Nat. Bank*, 54 Minn. 466. Thus, when a bank undertakes the collection of a note, it assumes the duty of taking the proper steps to fix the liability of the indorser: *West v. St. Paul Nat. Bank*, 54 Minn. 466, 468. It is bound to have everything done, according to the laws of the state, necessary in the case of nonpayment, to fix the full liability of the drawer and indorser: *Baldwin v. Bank of Louisiana*, 1 La. Ann. 13, 45 Am. Dec. 72; *Fabens v. Mercantile*

Bank, 28 Pick. 330, 34 Am. Dec. 59; Thompson v. Bank of South Carolina, 3 Hill (S. C.) 77; 1 Riley, 81, 30 Am. Dec. 354; Jagger v. National German-American Bank, 53 Minn. 386.

A bank acting as a collection agent must use reasonable diligence and care: First Nat. Bank v. First Nat. Bank, 4 Dill. 290; Diamond Mill Co. v. Groesbeck Nat. Bank, 9 Tex. Civ. App. 31, 33; Hazlett v. Commercial Nat. Bank, 182 Pa. St. 118, 125; German Nat. Bank v. Burns, 12 Colo. 539, 13 Am. St. Rep. 247; but it discharges this duty concerning a bill held by it for collection, if, when the paper becomes due, it places it in the hands of a notary for protest and for the proper notices to be given: Tiernan v. Commercial Bank, 7 How. 648, 40 Am. Dec. 83; Smedes v. Utica Bank, 20 Johns. 372. It exercises ordinary diligence when it employs its own servant with the usual instructions: Bellemire v. Bank of United States, 4 Whart. 105, 33 Am. Dec. 46. A bank undertaking to collect commercial paper must exercise proper diligence to obtain payment, though it is bound to keep within the authority conferred upon it: Omaha Nat. Bank v. Kiper, Neb., March, 1900. Whether a party has used due diligence to charge an indorser of a note is a question of fact for the jury: Thompson v. Bank of South Carolina, 3 Hill (S. C.) 77, 1 Riley, 81, 30 Am. Dec. 354. Where a bank undertakes to collect a note, the removal of the maker's domicile out of the city does not relieve the bank from the obligation of due diligence: Louisiana etc. Ins. Co. v. Louisiana State Bank, 3 Mart., N. S., 610; and a collecting bank, knowing the depressed financial condition of the debtor, is delinquent in its duty if it neglects to inform its customer of such vital condition and fails to take vigorous measures, under the circumstances, to secure payment. An agent is bound to exercise that degree of skill, care, and diligence which the nature of his undertaking calls for with reference to the time, place, and circumstances surrounding the undertaking: Commercial Bank v. Red River etc. Nat. Bank, 8 N. Dak. 382, 389, 391.

Presentment.—A bank which receives commercial paper for collection, such as a bill, note, or check, must use due diligence in presenting it for acceptance or payment upon the maturity thereof: Bank of New Hanover v. Kenan, 76 N. C. 340; Midland Nat. Bank v. Brightwell, 148 Mo. 358, 71 Am. St. Rep. 608; and is liable for its negligence in not so doing. The general duty of a bank which receives a draft or bill of exchange for collection is to use due diligence in presenting the same for acceptance, and in presenting it for payment, if it has been accepted. Otherwise the bank must answer for its negligence in case of loss: Merchants' etc. Bank v. Stafford Nat. Bank, 44 Conn. 564; Walker v. State Bank, 9 N. Y. 582; Exchange Nat. Bank v. Third Nat. Bank, 112 U. S. 276, 290; note to Allen v. Merchants' Bank, 34 Am. Dec. 310; Tyson v. State Bank, 6 Blackf. 225, 38 Am. Dec. 139; First Nat. Bank v. Fourth Nat. Bank, 77 N. Y. 820, 33 Am. Rep. 618. An agent receiving for collection,

before maturity, a draft payable on a particular day after date, is held to due diligence in making presentment for acceptance, and, if chargeable with negligence therein, is liable to the owner for all damages he has sustained by such negligence: *Exchange Nat. Bank v. Third Nat. Bank*, 112 U. S. 276, 291. An agent intrusted, for collection, with a draft or bill payable on a particular day, is liable for any unnecessary delay in presenting it for acceptance, although it may not be yet due; and drawers and indorsers of a bill payable at sight are released from liability by unreasonable delay in presenting it for acceptance or payment: *Allen v. Suydam*, 20 Wend. 321, 32 Am. Dec. 555. Where a bill of exchange, payable at a future time, is presented for acceptance, and acceptance is refused, notice must be immediately given to the drawer and indorsers, or they are discharged; if notice of nonacceptance is given, the holder may proceed immediately against the drawer and indorsers, without waiting for the bill to mature; and any agent, whether a bank or an individual, receiving a note or bill from the holder for collection, is answerable for any loss which the holder may sustain, on account of any neglect in presenting it, or in giving notice of its dishonor. It is the duty of an agent who receives for collection a bill of exchange, payable at some future time, to use due diligence in presenting the same for acceptance, and, if he fails to do so, or fails to give notice, in case acceptance is refused, he must answer therefor: *Walker v. State Bank*, 9 N. Y. 582, 584, per Selden, J. A bank which presents a bill of exchange for payment before the expiration of the days of grace to which it is entitled, and notifies the indorsers that payment has been refused upon such demand, which notices do not bind the indorsers on account of such premature presentment, is guilty of negligence and liable to an action by the owner of the bill: *Ivory v. State Bank*, 36 Mo. 475, 88 Am. Dec. 150. A bank to which a bill of exchange is sent to procure its acceptance, accompanied by a bill of lading, is, on the acceptance of such bill, authorized to surrender the bill of lading in the absence of instructions to the contrary, and the drawee may refuse to accept unless the bill of lading is surrendered: *Moore v. Louisiana Nat. Bank*, 44 La. Ann. 99, 82 Am. St. Rep. 332. The drawee is entitled to the bill of lading on accepting the draft, if it is a time draft, and it is not the bank's duty to hold the bill of lading after the draft has been accepted: *National Bank v. Merchants' Nat. Bank*, 91 U. S. 92; *Woolen v. New York etc. Bank*, 12 Blatchf. 359; *Commercial Bank v. Chicago etc. Ry. Co.*, 160 Ill. 401; *Bank v. Cummings*, 89 Tenn. 609, 24 Am. St. Rep. 618. But a bank which receives a sight draft for collection should not surrender an accompanying bill of lading until the draft has been paid: *Bank v. Cummings*, 89 Tenn. 609, 24 Am. St. Rep. 618. A bill of lading made deliverable to the consignor or his order, and which accompanies a time draft, must be retained by a

collecting bank, after acceptance of the draft, to secure its payment: *Bank v. Cummings*, 89 Tenn. 609, 24 Am. St. Rep. 618, and see *Dows v. National Exchange Bank*, 91 U. S. 618, 631.

A customer's check, submitted to a bank for collection, should be presented for payment with the dispatch and diligence consistent with the circumstances of the case and the transaction of other commercial business: *Western etc. Scraper Co. v. Sadilek*, 50 Neb. 105, 61 Am. St. Rep. 550. Compare *First Nat. Bank v. Miller*, 37 Neb. 500, 40 Am. St. Rep. 499, showing the diligence required, generally, in the presentment of checks, particularly where it is sought to charge an indorser. A collecting agent exceeds his authority when he takes the check of a debtor instead of money. Hence, a delay of presentment for a day, or for any time beyond that within which, with proper and reasonable diligence, it can be presented, is at the peril of the party thus retaining the check and postponing payment: *Industrial etc. Sav. Co. v. Weakley*, 103 Ala. 458, 49 Am. St. Rep. 45. If a bank receives such a check in payment of a claim held by it for collection, its duty is to present it for payment on the same day it is received. A check not being payment, the bank taking it must stand any loss occurring before it is cashed: *Morris v. Eufaula Nat. Bank*, 106 Ala. 383; and see *Turner v. Bank of Fox Lake*, 4 Abb. App. Dec. 434. If a bank receives a check upon itself for collection, and retains it for four days, without presenting it for payment, or making any effort for its collection, or giving any notice to its customer of its nonpayment, the bank is negligent and is liable for loss, if any: *Bank of New Hanover v. Kenan*, 76 N. C. 340, 341.

Demand and Protest.—It is the duty of a bank holding commercial paper for collection to use ordinary diligence in demanding payment of the acceptor or maker. If it fails to do so, and the indorsers are released thereby, the bank is answerable: *Armington v. Gas Light etc. Co.*, 15 La. 414, 35 Am. Dec. 205; *Tyson v. State Bank*, 6 Blackf. 225, 38 Am. Dec. 139; *Branch Bank v. Knox*, 1 Ala. 148; note to *Allen v. Merchants' Bank*, 34 Am. Dec. 310. Thus, by failing to demand the payment of a bill held for collection, the bank makes the bill its own, and is answerable to its real owner for the amount. The duty of a bank is the same, whoever may be the owner of the bill; and if it is unwilling to undertake the collection without precise information on the subject, that duty ought to be declined: *Bank of Washington v. Triplett*, 1 Pet. 25, 30.

A bank which takes a promissory note for collection is in duty bound to demand payment of the maker and take the necessary steps to fix the full liability of the drawer and indorsers. Otherwise, it must answer for its negligence: *Baldwin v. Bank of Louisiana*, 1 La. Ann. 13, 45 Am. Dec. 72; *Commercial etc. Bank v. Hamer*, 7 How. 443, 40 Am. Dec. 80; *Fabens v. Mercantile Bank*, 23 Pick. 330, 34 Am. Dec. 59; *Thompson v. Bank of South Carolina*, 3 Hill

(S. C.), 77; 1 Riley, 81, 30 Am. Dec. 354; Durnford v. Patterson, 7 Mart. 460, 12 Am. Dec. 514; Bank of Lindsborg v. Ober, 31 Kan. 599; Bank v. Bank, 49 Ohio St. 351; Capitol State Bank v. Lane, 52 Miss. 677; Jagger v. National German-American Bank, 53 Minn. 386; Coghlan v. Dinsmore, 9 Bosw. 453. If a note is payable at the bank to which it is indorsed for collection, no demand is necessary. "It is enough if the note be in the bank on the day appointed for its payment": Goodloe v. Godley, 13 Smedes & M. 233, 51 Am. Dec. 159. See, also, Hallowell v. Curry, 41 Pa. St. 322. The last indorser of a promissory note, who leaves it with a bank for collection, is himself the depositor, and the bank is answerable to him for the performance of its duty to make the collection: Thompson v. Bank of South Carolina, 3 Hill (S. C.), 77; 1 Riley, 81, 30 Am. Dec. 354. A bank receiving for collection a note payable at another place, or whose acceptor resides in another place, need only seasonably transmit the same to some suitable bank or agent for collection at the place of payment or of the residence of such acceptor: Fabens v. Mercantile Bank, 23 Pick. 330, 34 Am. Dec. 59. A demand made after the close of business hours at the bank at which the note is payable is yet sufficient, if the proper officer of the bank is found, and his refusal to pay is upon the ground that there are no funds in the bank to meet the note, and that there have not been at any time during business hours: Commercial etc. Bank v. Hamer, 7 How. 448, 40 Am. Dec. 80. If the third day of grace on a note falls on Sunday, the bank is not negligent in omitting to demand payment on the preceding Saturday. Such demand may be deferred until Monday: Patriotic Bank v. Farmers' Bank, 2 Cranch C. C. 560; and compare Hallowell v. Curry, 41 Pa. St. 322. If demand on a note is prematurely made, it is as bad as if made too late or not at all. Hence, if through mistake as to the date of a bill or note, or for any other cause, demand and protest are made before the instrument matures, or before the expiration of the days of grace, where grace is allowed, and the indorser is thereby discharged, the bank must answer: Bank of Delaware Co. v. Broomhall, 38 Pa. St. 135, 30 Am. Dec. 471; Ivory v. Bank of Missouri, 36 Mo. 475, 38 Am. Dec. 150; American Exp. Co. v. Haire, 21 Ind. 4, 33 Am. Dec. 334; Georgia Nat. Bank v. Henderson, 46 Ga. 487, 12 Am. Rep. 590.

Protest.—When commercial paper is placed with a bank for collection, its duty is, if the paper is not paid upon presentment for payment at maturity, to at once fix the liability of the drawer and indorsers by having it protested, and by giving due notice of its dishonor to the depositor for collection. A failure to perform this duty will make the bank answerable in damages for losses sustained through its neglect: Bank of New Hanover v. Kenan, 76 N. C. 340, 343; Steele v. Russell, 5 Neb. 211; Capitol State Bank v. Lane, 52 Miss. 677, 679; Bank of Mobile v. Huggins, 3 Ala. 206; Canouge v. Louisiana State Bank, 3 Mart., N. S., 344; Chapman v. McCrea, 63 Ind. 360; Bird v. Louisiana State Bank, 93 U. S. 96;

Mount v. First Nat. Bank, 37 Iowa, 457. Especially is this true where the bank specifically undertakes to protest paper for the purpose of charging the indorser: Mount v. First Nat. Bank, 37 Iowa, 457. If paper is not to be protested, but is to be returned at once, if not paid, it is the duty of the bank, in case of nonpayment, to return the paper at once or notify its customer of the delay in payment: Merchants' etc. Bank v. Stafford Bank, 44 Conn. 564, 567. A collecting bank, for the purposes of protest, occupies the position, and is held to the obligations, of a holder of commercial paper: State Bank v. Bank, 41 Barb. 343. If protest takes place on Saturday, a notice mailed on the following Monday is in time: Howard v. Ives, 1 Hill, 263. Protest, however, may be waived. If the indorser has expressly waived notice by an indorsement on the note, such waiver excuses the bank from giving him notice, even if it would otherwise be required to do so: Blanc v. Mutual Nat. Bank, 28 La. Ann. 921, 26 Am. Rep. 119. Bank checks do not require a formal protest to charge indorsers; but, where they are forwarded from one bank to another, and payment is refused for want of funds, the refusing bank must give notice to the forwarding bank not later than the next day after the dishonor. If they are held for two days to enable the drawer to provide funds for their payment, a jury is justified in finding that the receiving bank intended to accept them and, by its delay, became answerable therefor: Wood River Bank v. First Nat. Bank, 36 Neb. 744, 746.

Notice of Dishonor.—A bank having a note, bill, or check for collection is bound to the exercise of due and proper diligence, not only in making demand for payment, but in giving notice in case of nonpayment, so as to hold all parties; and in default of such diligence, the bank is answerable, in case of loss, to the holder of the paper: Commercial etc. Bank v. Hamer, 7 How. 443, 40 Am. Dec. 80; Fabens v. Mercantile Bank, 23 Pick. 330, 34 Am. Dec. 59; Selz v. Collins, 55 Mo. App. 55; McKinster v. Bank of Utica, 9 Wend. 46; West v. St. Paul Nat. Bank, 54 Minn. 466; Bank of Lindsborg v. Ober, 31 Kan. 599; Bartlett v. Isbell, 31 Conn. 296, 33 Am. Dec. 146; Bank v. Bank, 49 Ohio St. 351; Capitol State Bank v. Lane, 52 Miss. 677; Jagger v. National German-American Bank, 53 Minn. 386; Crawford v. Louisiana State Bank, 1 Mart., N. S., 214; Downer v. Madison County Bank, 6 Hill, 648; Pahquoque Bank v. Bethel Bank, 36 Conn. 325, 4 Am. Rep. 80; Merchants' etc. Bank v. Stafford Bank, 44 Conn. 564, 567; Exchange Nat. Bank v. Third Nat. Bank, 4 Fed. Rep. 20; West v. St. Paul Nat. Bank, 54 Minn. 466; Walker v. State Bank, 9 N. Y. 582; Warren Bank v. Suffolk Bank, 10 Cush. 582, 585; Bank of New Hanover v. Kenan, 76 N. C. 340. Compare Merchants' State Bank v. State Bank, 94 Wis. 444. There is some diversity of adjudication upon the point whether it is the duty of a bank having a note or bill for collection to give notice of its dishonor to all the prior indorsers or only to the principal: Note to Allen v. Merchants' Bank, 34 Am. Dec. 311.

Some of the cases hold that the collecting bank must give notice to all the indorsers: *Thompson v. Bank of South Carolina*, 3 Hill (S. C.), 77; 1 *Riley*, 81, 80 Am. Dec. 354; *Smedes v. Bank of Utica*, 20 Johns. 372; *McKinster v. Bank of Utica*, 9 Wend. 46; *Bank of Utica v. McKinster*, 11 Wend. 473. The decided preponderance of authority, however, is in favor of the position that, in the absence of special instructions, notice given by the collecting bank to its principal in time to enable him to give seasonable notice to those to whom he intends to resort, is sufficient, the bank being regarded as the real holder so far as giving and receiving notice is concerned: *Bank of Mobile v. Huggins*, 3 Ala. 206; *Burnham v. Webster*, 19 Me. 232; *Colt v. Noble*, 5 Mass. 167; *Farmers' Bank v. Vail*, 21 N. Y. 485; *United States Bank v. Goddard*, 5 Mason, 366; *Mead v. Enga*, 5 Cow. 303; *Howard v. Ives*, 1 Hill, 263; *State Bank v. Bank*, 41 Barb. 343; *Phipps v. Millbury Bank*, 8 Met. 79. The bank must give notice to its principal in the same time as if it were a party to the note, and the principal may then give notice to the indorsers and it will be sufficient: *United States Bank v. Goddard*, 5 Mason, 366; *Colt v. Noble*, 5 Mass. 167; *Howard v. Ives*, 1 Hill, 263; *Farmers' Bank v. Vail*, 21 N. Y. 485, 488. If paper in the hands of a collecting bank is not paid, the bank must give notice of nonpayment to the bank from which the paper was received, but is not bound, unless by special agreement, to give notice to the other parties to it: *State Bank v. Bank*, 41 Barb. 343; *Phipps v. Millbury Bank*, 8 Met. 79. An undertaking on the part of the bank to send notice to some of the prior parties is not evidence of an agreement to notify all the indorsers: *State Bank v. Bank*, 41 Barb. 343. Although the bank is not required to give notice to anybody but its immediate principal, but does, in fact, give notice to the drawer in the same time as he would have received it from the holder, it is sufficient: *Tunno v. Lague*, 2 Johns. Cas. 1, 1 Am. Dec. 141. And, if the collecting agent uses due diligence to ascertain the indorser's residence, and, in accordance with the information received, sends notice to the wrong address, it is nevertheless good, it seems, although the holder knew the indorser's residence: *Bartlett v. Isbell*, 31 Conn. 296, 83 Am. Dec. 146. The failure of a bank, holding a bill for collection, payable after date, to give notice to the drawer that the drawee was not found at home, when called upon to accept the bill, is not such negligence as will discharge the drawer: *Bank of Washington v. Triplett*, 1 Pet. 25.

Notice of nonacceptance of a bill must be given, under the general commercial law, to charge an indorser, although presentment for acceptance was unnecessary: *Allen v. Merchants' Bank*, 22 Wend. 215, 34 Am. Dec. 289. A notice by letter to an indorser residing in the same town is insufficient, where no ignorance of the place of his domicile, nor attempt to find it has been shown: *Miranda v. City Bank*, 6 La. 740, 26 Am. Dec. 493. And mere knowledge on the part of an indorser that paper has been dishonored is

not notice. Notice must come from one who is entitled to look to him for payment, and must inform him that the paper has been duly presented for payment, that it has been dishonored, and that the holder looks to him for payment; although, if the first two of these requisites were expressed in the notice, the third would probably be implied: *Jagger v. National German-American Bank*, 53 Minn. 386; but compare *West Branch Bank v. Fulmer*, 3 Pa. St. 399, 45 Am. Dec. 651, cited, *infra*, in this subdivision. The destruction of a bank building by fire, where its vault has not been destroyed and where it has resumed business in a tentative way in a temporary structure, at the time notes sent to it for collection become due, is not such an overwhelming calamity or unavoidable accident as will excuse a failure to notify indorsers within the time required to charge them with liability, where such notice would be the work of a few minutes only and directly in the line of the business re-established by the bank after the fire: *Merchants' State Bank v. State Bank*, 94 Wis. 444. To deprive an indorsee of his usual rights to notice of dishonor, facts showing fraud upon his part must be alleged: *Citizens' Nat. Bank v. Third Nat. Bank*, 19 Ind. App. 69, 77. The fact that the drawer of a draft is insolvent does not excuse a collecting bank from giving the indorsee notice of the presentment and nonacceptance of the draft by the drawee: *Citizens' Nat. Bank v. Third Nat. Bank*, 19 Ind. App. 69.

Notice of nonpayment of commercial paper must be given within a reasonable time, such as by the next post or on the next business day: *Mead v. Engs*, 5 Cow. 303; *Whiting v. City Bank*, 77 N. Y. 363; *Howard v. Ives*, 1 Hill, 263. Thus, if a note matures on Saturday and is dishonored on that day, notice of nonpayment is sufficient if mailed on Monday: *Farmers' Bank v. Vail*, 21 N. Y. 485, 489; *Hallowell v. Curry*, 41 Pa. St. 322; and see *Howard v. Ives*, 1 Hill, 263; *Whiting v. City Bank*, 77 N. Y. 363. In the case of a circuitous notice, it will be in time if the intermediate party forwards it the next day after he receives it: *Farmers' Bank v. Vail*, 21 N. Y. 485, 489. Where a check is transmitted by a collecting bank to another, the latter is to give notice to its principal, one day being allowed to each recipient of notice to give notice to his or its predecessor: *Prideaux v. Criddle*, L. R. 4 Q. B. 455. If a bank undertakes the collection of a customer's check and sends it to the drawee bank for payment, it is the duty of the latter bank to promptly pay the check upon presentment, or to give notice of its dishonor, in order to charge the drawers and indorsers. If the check is received by such bank, and there is no question but the drawer has moneys therein sufficient to pay it, its failure to at once make payment is a dishonor of the check, of which the drawer is entitled to notice by the first regular mail on the day following, and, such notice not being given, he is released: *Western etc. Scraper Co. v. Sadilek*, 50 Neb. 105, 61 Am. St. Rep. 550. But a bank employed to collect is bound to present for payment, and to give

notice of dishonor, only when those measures are necessary to preserve its employer's recourse to those who are contingently answerable to him. Thus, notice of the dishonor of a promissory note need not be given to an indorser, when the members of the firm making the indorsement are also members of the firm who made the note: *West Branch Bank v. Fulmer*, 3 Pa. St. 399, 45 Am. Dec. 651. That knowledge, however, is not notice, see *Jagger v. National German-American Bank*, 53 Minn. 388, cited *supra*, in this subdivision.

Transmitting to Distant Place.—When a bank receives, for collection, commercial paper which has to be transmitted to another place to be collected, it discharges its duty by sending it in due season to a competent, reliable agent, with proper instructions, for its collection: *Aetna Ins. Co. v. Alton City Bank*, 25 Ill. 243, 79 Am. Dec. 328; *Daly v. Butchers' etc. Bank*, 56 Mo. 94, 101, 17 Am. Rep. 663; *Fabens v. Mercantile Bank*, 23 Pick. 330, 34 Am. Dec. 59; *Branch Bank v. Knox*, 1 Ala. 148; *Kavanaugh v. Farmers' Bank*, 59 Mo. App. 540. Thus, if a promissory note secured by a mortgage is transferred to a bank as collateral security, which must be sent to a distant place for collection, it fulfills its implied requirement of reasonable diligence by placing such note for collection in the hands of an attorney having the reputation of being competent and reliable, and it is not answerable for the subsequent neglect of the attorney in the performance of the duties intrusted to him: *Plymouth County Bank v. Gilman*, 9 S. Dak. 278, 62 Am. St. Rep. 868. A draft received on Saturday, after business hours, may be forwarded on Monday: *Indig v. National City Bank*, 80 N. Y. 100. So, if a bank receives checks for collection, after banking hours, against a bank in another place, it exercises due diligence by sending them, on the next day, to a third bank for collection: *Givan v. Bank*, Tenn. Ch. App., Nov., 1898. If a bank transmits a draft for collection, and it is not heard from within a reasonable time, it is the duty of the forwarding bank to inquire about it, and to notify its customer of the situation: *Trinidad Nat. Bank v. Denver Nat. Bank*, 4 Dill. 290.

On the other hand, a bank does not perform its duty by selecting an unsuitable agent to make the collection for its customer. A selection of the party or bank, whose duty it is to make payment, is not the selection of a suitable agent, and, in case of loss, the bank which selects such agent must bear the loss resulting to its employer: See the principal case; *German Nat. Bank v. Burns*, 12 Colo. 539, 13 Am. St. Rep. 247; *Drovers' Nat. Bank v. Anglo-American Packing Co.*, 18 Ill. App. 191. A suitable correspondent or agent must, from the nature of the case, be some one other than the party who is to make payment: *Drovers' Nat. Bank v. Anglo-American Packing Co.*, 18 Ill. App. 191. It has, therefore, been held that a bank which undertakes the collection of a customer's check is, in the absence of instructions, negligent in sending it direct to

the drawee bank, instead of through the agency of a third person, and is answerable for any loss which may ensue through adopting such a course: See principal case; *Western etc. Scraper Co. v. Saddlek*, 50 Neb. 105, 61 Am. St. Rep. 550; *Merchants' Nat. Bank v. Goodman*, 109 Pa. St. 422, 58 Am. Rep. 728; *Drovers' Nat. Bank v. Anglo-American Packing Co.*, 117 Ill. 100, 57 Am. Rep. 855; *Briggs v. Central Nat. Bank*, 89 N. Y. 182, 42 Am. Rep. 285; *Anderson v. Rodgers*, 53 Kan. 542; *Givan v. Bank*, Tenn. Ch. App., Nov., 1888; *American etc. Nat. Bank v. Metropolitan Nat. Bank*, 71 Mo. App. 451; *First Nat. Bank v. Citizens' Sav. Bank*, Mich., March, 1900; *Fifth Nat. Bank v. Ashworth*, 123 Pa. St. 212; and see *Lowenstein v. Bresler*, 109 Ala. 826. A custom or usage cannot be successfully set up as a justification for sending a check directly to the drawee bank by mail, for it is unreasonable: *American etc. Nat. Bank v. Metropolitan Nat. Bank*, 71 Mo. App. 451; *Whitney v. Elson*, 99 Mass. 308, 96 Am. Dec. 762. Contra, *Farmers' etc. Trust Co. v. Newland*, 97 Ky. 464; *Kershaw v. Ladd*, 34 Or. 375, holding that it is not negligence for a bank, holding an ordinary, unindorsed check for collection, to send it to the drawee with a request for payment, where such a custom prevails among banks. The rule that such a transmission is negligent prevails, though the payor is the only bank in the place: See the principal case; *American etc. Nat. Bank v. Metropolitan Nat. Bank*, 71 Mo. App. 451. "The only safe rule," says Scholfeld, J., in *Drovers' Nat. Bank v. Anglo-American Packing Co.*, 117 Ill. 100, 57 Am. Rep. 855, "is to hold that an agent with whom a check or bill is deposited for collection must transmit it to a suitable agent, to demand payment in such manner that no loss can happen to any party, whether he is a depositor and indorser, or the indorsee and holder." A bank is negligent when it sends a certificate of deposit by mail, for payment, to the bank whose duty it is to make such payment, and it is therefore answerable for any damages resulting to its employer from such neglect: *German Nat. Bank v. Burns*, 12 Colo. 539, 13 Am. St. Rep. 247; *First Nat. Bank v. Fourth Nat. Bank*, 56 Fed. Rep. 967. The bank becomes unconditionally liable for the amount of the certificate so sent, if it requests a credit therefor, and the certificate is received by the bank, which ought to pay before it has suspended: *German Nat. Bank v. Burns*, 12 Colo. 539, 13 Am. St. Rep. 247. A bank intrusted with negotiable paper for collection must have it presented to the drawee for payment by a suitable agent who must be some party other than the drawee. A failure on the part of the collecting bank to perform this duty is negligence, for which, as between the drawer and payee, the latter must suffer. Hence, if a bank, upon receiving a check from the payee for collection, sends it direct to the bank against which it is drawn, and the latter, although having sufficient funds of the drawer at the time it is received to pay it, neglects to do so, and subsequently fails before payment is made, the negligence of the collecting bank in so

sending the check is such as to prevent any recovery by the payee against the drawer. The fact that the latter, through misrepresentations by the former, sends him a duplicate check, does not change the legal rights of the parties: *Wagner v. Crook*, 167 Pa. St. 259, 46 Am. St. Rep. 672.

Liability for Negligence—Notaries, Correspondents, and Other Agents. If a bank, intrusted with commercial paper for collection, falls in any of the duties imposed upon it as to presentment, demand, or notice, it is answerable for such failure, where loss ensues to the owner; but, while collecting banks are liable for their own negligence in making collections for customers (*Bank of New Hanover v. Kenan*, 76 N. C. 340, 343; *Kershaw v. Ladd*, 34 Or. 375; *Hazlett v. Commercial Nat. Bank*, 132 Pa. St. 118, 125; *Commercial Bank v. Red River etc. Nat. Bank*, 8 N. Dak. 382; *Dern v. Kellogg*, 54 Neb. 560; *Ivory v. State Bank*, 36 Mo. 475, 88 Am. Dec. 150; *First Nat. Bank v. First Nat. Bank*, 4 Dill. 290; *Bank of Mobile v. Huggins*, 3 Ala. 206; *Exchange Nat. Bank v. Third Nat. Bank*, 112 U. S. 276; *Diamond Mill Co. v. Groesbeck Nat. Bank*, 9 Tex. Civ. App. 31, 33; *Mound City Paint etc. Co. v. Commercial Nat. Bank*, 4 Utah, 353; *Sels v. Collins*, 55 Mo. App. 55; *McKinster v. Bank of Utica*, 9 Wend. 46; *Merchants' etc. Bank v. Stafford Bank*, 44 Conn. 564; *Branch Bank v. Knox*, 1 Ala. 148; *First Nat. Bank v. Fourth Nat. Bank*, 77 N. Y. 320, 33 Am. Rep. 618, and numerous other cases cited in the note to *German Nat. Bank v. Burns*, 13 Am. St. Rep. 253), they are not liable for the negligence of their correspondent banks in other places, when such correspondents have been carefully selected: Note to *German Nat. Bank v. Burns*, 13 Am. St. Rep. 253; and see, *infra*, in this subdivision. A bank, however, which has performed its duty in the matter of a collection is not negligent or liable for a loss to its customer, or liable where no injury occurs: *Sahlén v. Bank*, 90 Tenn. 221; *Kershaw v. Ladd*, 34 Or. 375; *Crouse v. First Nat. Bank*, 137 N. Y. 883; *Idé v. Bremer County Bank*, 78 Iowa, 58. Neither is the bank liable, though negligent, if the customer, being informed of the facts, condones the negligence: *Hazlett v. Commercial Nat. Bank*, 132 Pa. St. 118; or unless it is shown that the claim was collectible by due diligence and was lost in consequence of the bank's negligence: *Sahlén v. Bank*, 90 Tenn. 221; and the complaint must allege negligence: *Farmers' etc. Trust Co. v. Newland*, 97 Ky. 464.

Among the courts of this country, two theories exist concerning the liability of banks undertaking to collect commercial paper at a distance. One line of authorities holds to the rule that the forwarding bank is liable only for the selection of a suitable local agent with whom to intrust the collection, and that the agent so selected becomes the agent of the owner of the paper; while, on the other hand, it is held that the forwarding bank makes the local agent its own subagent, and is liable for any neglect on the part of such subagent. The authorities on the question are summed up in

the extended note to *Isham v. Post*, 38 Am. St. Rep. 777, and the conclusion reached that the second rule is sustained by the decisions of the English courts and of the supreme court of the United States; but that the preponderance of decision in the state courts alone is in favor of the first rule. We shall, therefore, simply cite some additional cases. Where a collecting bank takes commercial paper for collection at a distant place, and selects a correspondent bank at such place, with proper instructions, to make the collection, the latter bank is not regarded as the agent of the former bank; but as the agent of the owner, and the former bank is not answerable for any default, omission, negligence, failure, or misappropriation by the latter, where due care was used in selecting the corresponding bank: See principal case; *Waterloo Milling Co. v. Kuenster*, 158 Ill. 259, 49 Am. St. Rep. 156; *American etc. Nat. Bank v. Metropolitan Nat. Bank*, 71 Mo. App. 451; *Bank of Louisville v. First Nat. Bank*, 8 Baxt. 101, 35 Am. Rep. 691, and note; *Irwin v. Reeves Pulley Co.*, 20 Ind. App. 101, 115, and numerous authorities there cited; *Farmers' etc. Trust Co. v. Newland*, 97 Ky. 464; *Warren Bank v. Suffolk Bank*, 10 Cush. 582, 585; *Carlinville Nat. Bank v. Wilson*, 78 Ill. App. 339; *Commercial Bank v. Red River etc. Nat. Bank*, 8 N. Dak. 382; *Finch v. Karste*, 97 Mich. 20; *Tiernan v. Commercial Bank*, 7 How. 648, 40 Am. Dec. 83. And the same principle applies where the collecting bank employs attorneys to make the collection, instead of a bank: *Commercial Bank v. Martin*, 1 La. Ann. 344, 45 Am. Dec. 87; *Plymouth County Bank v. Gilman*, 9 S. Dak. 278, 62 Am. St. Rep. 868.

But that, in the absence of any agreement to the contrary, a bank which receives commercial paper from a customer is liable to him for any negligence whereby the collection of the paper is defeated, whether such negligence is that of its own officers, or of a subagent or correspondent to whom the paper is sent for collection, see *Baille v. Augusta Sav. Bank*, 95 Ga. 277, 51 Am. St. Rep. 74; *Naser v. First Nat. Bank*, 116 N. Y. 492; *St. Nicholas Bank v. State Nat. Bank*, 128 N. Y. 26; *Castle v. Corn etc. Bank*, 148 N. Y. 122; *Corn etc. Bank v. Farmers' Nat. Bank*, 118 N. Y. 443, 447; *Power v. First Nat. Bank*, 6 Mont. 251; *Reeves v. State Bank*, 8 Ohio St. 466. It makes no difference that the bank does not charge anything for the collection, and it is immaterial whether such subagent or correspondent is the bank upon which the check is drawn, or another: *Baille v. Augusta Sav. Bank*, 95 Ga. 277, 51 Am. St. Rep. 74. A bank which receives for collection a check sent by another bank holding it only for collection is the agent of the latter, and not of the payee: *Castle v. Corn etc. Bank*, 148 N. Y. 122. If one bank intrusts a collection to another bank, the latter is the agent of the former, and has no connection with the owner: *Sherman v. Port Huron etc. Thresher Co.*, 8 S. Dak. 343.

The liability of a collecting bank for the acts or omissions of notaries, concerning commercial paper, placed by it in their hands,

is also discussed in the extended note to *Isham v. Post*, 38 Am. St. Rep. 776. As there said, there are states in which the relations of a collecting bank and the notary are deemed to be those of principal and agent, and in which the bank is therefore held answerable for negligence or other misconduct on the part of the notary, through which the owner of the paper suffers loss: See, also, *Davey v. Jones*, 42 N. J. L. 28, 36 Am. Rep. 505; *Allen v. Merchants' Bank*, 22 Wend. 215, 34 Am. Dec. 289; *Bank of Lindsborg v. Ober*, 31 Kan. 599. But the prevailing doctrine is that the bank is not answerable for the default, negligence, or omission of a notary, through which the owner suffers loss, where the bank has exercised due care in selecting a reputable and competent notary, or has placed the instrument, for presentment and protest, in the hands of the notary whom it regularly employs to perform such service: Note to *Isham v. Post*, 38 Am. St. Rep. 776. This rule is also considered in *First Nat. Bank v. German Bank*, 107 Iowa, 543, 70 Am. St. Rep. 216, to be sustained not only by the weight of authority but by "the better reason." A bank receiving a bill for collection, discharges its duty, if, when the bill becomes due, it places it in the hands of a notary for protest and for the proper notices to be given, and is not liable though recourse is lost against the indorsers because of the failure of the notary to properly discharge this duty: *Tiernan v. Commercial Bank*, 7 How. 648, 40 Am. Dec. 83.

Instructions—Provisional Credit.—It is the duty of a bank, in making a collection, to follow the instructions given. If it fails to do so, it will be liable, in the event of loss: *Bank of Mobile v. Huggins*, 3 Ala. 206; *National Bank v. City Bank*, 103 U. S. 668; *Butts v. Phelps*, 90 Mo. 670; *Central Georgia Bank v. Cleveland Nat. Bank*, 59 Ga. 667; *Borup v. Nininger*, 5 Minn. 523; *Merchants' etc. Bank v. Stafford Bank*, 44 Conn. 564, 567; but not otherwise: *People's Nat. Bank v. Freeman's Nat. Bank*, 160 Mass. 129, 61 Am. St. Rep. 279; *Ide v. Bremer County Bank*, 73 Iowa, 58; *Finch v. Karste*, 97 Mich. 20. If there is an instruction to "protest," it must be complied with, although protest might not otherwise be necessary: *Ayrault v. Pacific Bank*, 47 N. Y. 570, 7 Am. Rep. 489; and instructions given to the bank taking the paper for collection must be transmitted to its correspondent, where the collection is to be made in a distant place: *Borup v. Nininger*, 5 Minn. 523. A collecting bank without instructions is not answerable for mere error of judgment: *Sahlen v. Bank*, 90 Tenn. 221.

It is not unusual for bankers to credit their customers with paper, left with them for collection, in advance of the actual receipt of the proceeds. Ordinarily, this is a provisional credit only, made in anticipation that the paper will be promptly paid, and with the right to cancel the credit if the paper is dishonored: *First Nat. Bank v. Bank of Monroe*, 33 Fed. Rep. 408, 411; *Midland Nat. Bank v. Brightwell*, 148 Mo. 358, 71 Am. St. Rep. 608; *Hazlett v. Commercial Nat. Bank*, 132 Pa. St. 118, 125; *Bank v. Cummings*, 89 Tenn.

600, 24 Am. St. Rep. 618; National Gold Bank etc. Co. v. McDonald, 51 Cal. 64, 21 Am. Rep. 697; Freeholders v. State Bank, 32 N. J. Eq. 467, 468; Manufacturers' Nat. Bank v. Continental Bank, 148 Mass. 553, 12 Am. St. Rep. 598; Evansville Bank v. German-American Bank, 155 U. S. 556, 562.

Usage or Custom.—In the absence of instructions, a customer of a collecting bank is probably bound, to some extent, at least, by the usages and customs under which the bank makes collections, as such usages and customs, if reasonable and lawful, would afford very cogent, if not controlling, evidence affecting the question of the bank's negligence: Sahlien v. Bank, 90 Tenn. 221; Warren Bank v. Suffolk Bank, 10 Cush. 582; Lincoln etc. Bank v. Page, 9 Mass. 155, 6 Am. Dec. 52; Indig v. National City Bank, 80 N. Y. 100; National Butchers' etc. Bank v. Hubbell, 117 N. Y. 384, 15 Am. St. Rep. 515. Established usages of the bank, so far as presentment, demand, and notice are concerned, may well form a part of the contract with parties who have dealings with the bank; but when it comes to accepting payment by the debtor's check because it is authorized by custom or usage, the validity of such custom or usage may well be questioned. It has been held that a custom of banks to accept checks of the payor in payment of a collection is binding upon a customer, whether he has knowledge of the usage or not, in the absence of any direction by him as to the mode of payment: Farmers' etc. Trust Co. v. Newland, 97 Ky. 464; Savings Bank v. National Bank, 98 Tenn. 337. The contrary is held in State Bank v. Bryne, 97 Mich. 178, 37 Am. St. Rep. 332, and National Bank v. American Exch. Bank, 151 Mo. 320, 74 Am. St. Rep. 527; and compare "Payment," *infra*. One thing is quite certain under the authorities, and that is that no usage or custom of collecting banks in dealing with commercial paper will justify or excuse negligence: Exchange Nat. Bank v. Third Nat. Bank, 112 U. S. 276, 290; Ivory v. State Bank, 36 Mo. 475, 88 Am. Dec. 150. Usage can only regulate the manner of the performance of required acts; it cannot excuse nonperformance: Citizens' Nat. Bank v. Third Nat. Bank, 19 Ind. App. 66, 79; and does not justify the receiving of worthless checks in payment for a collection: National Bank v. American Exch. Bank, 151 Mo. 320, 74 Am. St. Rep. 527.

Suit by Bank.—A bank is not required to employ counsel and to bring suit upon commercial paper placed in its hands for collection, unless it has contracted to do so: Crow v. Mechanics' etc. Bank, 12 La. Ann. 692; Freeman v. Citizens' Nat. Bank, 78 Iowa, 150; and a bank need not push execution of judgment to a *capias ad satisfaciendum*, where it is directed to cause suit to be brought on a note, no request to pursue such a course having been shown nor damage from not resorting to it: Commercial Bank v. Martin, 1 La. Ann. 344, 45 Am. Dec. 87.

Payment.—A bank authorized to collect commercial paper for another bank has no implied power to receive anything except money

in payment. Unless specially authorized, it is the duty of the bank to receive in payment nothing but money, or that which, by common consent, is considered and treated as money: *National Bank v. American Exch. Bank*, 151 Mo. 320, 74 Am. St. Rep. 527; *Midland Nat. Bank v. Brightwell*, 148 Mo. 358, 71 Am. St. Rep. 608; *Hazlett v. Commercial Nat. Bank*, 132 Pa. St. 118; *National Bank v. Johnson*, 6 N. Dak. 180; *Ward v. Smith*, 7 Wall. 447; *Alley v. Rogers*, 19 Gratt. 368. A check is not payment: *National Bank v. American Exch. Bank*, 151 Mo. 320, 74 Am. St. Rep. 527; *Turner v. Bank*, 4 Abb. App. 434; and if the bank takes one it must present it for payment at once: *First Nat. Bank v. Fourth Nat. Bank*, 89 N. Y. 413; for it becomes operative as payment in fact only when paid: *Morris v. Eufaula Nat. Bank*, 106 Ala. 383; *Thomas v. Supervisors*, 115 N. Y. 47. That a check may be received as payment, according to usage, see *Farmers' etc. Trust Co. v. Newland*, 97 Ky. 464. A collecting bank has no power to receive a certified check as payment. If an ordinary check or certified check is received in payment, the collecting bank assumes the risk that it will be paid, and is liable if it is not paid: *National Bank v. American Exch. Bank*, 151 Mo. 320, 74 Am. St. Rep. 527; *Essex Co. Nat. Bank v. Bank of Montreal*, 7 Biss. 193; *Fifth Nat. Bank v. Ashworth*, 123 Pa. St. 212. It has been held, however, that payment to a bank in its own check of a claim placed in its hands for collection is equivalent to a payment in money, though it falls on the same day: *Sayles v. Cox*, 95 Tenn. 579, 49 Am. St. Rep. 940; and that a collecting bank is entitled to receive in payment overdrafts and certificates of deposit on itself, and thereby to discharge the debtor: *Akin v. Jones*, 98 Tenn. 358, 42 Am. St. Rep. 921. A bank may receive its own certificate of deposit as money: *British etc. Mortgage Co. v. Tibballs*, 63 Iowa, 468. Partial payment cannot be accepted by a collecting bank: *Lowenstein v. Bresler*, 109 Ala. 326.

Proceeds.—A banker is bound to return paper intrusted to it for collection or to account for the amount of its proceeds: *McClure v. Osborne*, 86 Ill. App. 465; but the custom of bankers to credit customers with the proceeds of paper left for collection when the paper has been collected is universally recognized: *First Nat. Bank v. Bank of Monroe*, 33 Fed. Rep. 408, 411; and the bank is not bound to keep the moneys collected separate from all other moneys in its possession: *First Nat. Bank v. Wilmington*, 77 Fed. Rep. 401.

PARK v. CROSS.

[76 Minnesota, 187.]

PAYMENT—AGENT'S AUTHORITY TO RECEIVE BEFORE DEBT IS DUE.—An agent authorized to collect the principal and interest of a loan has no authority to receive either the principal or interest before it is due, and payment made to him by the debtor before that time is at the latter's risk.

F. H. Peterson, for the appellant.

W. B. Douglas and J. B. Campbell, for the respondent.

187 CANTY, J. This is an action to restrain the foreclosure of a mortgage under the power of sale, on the ground that plaintiff, the mortgagor, had partly paid the mortgage debt, and had tendered payment of the balance due. On the trial, the court, sitting without a jury, found for plaintiff, and defendant appeals from an order denying a new trial.

The mortgaged premises are city property situated in Moorhead. The note and mortgage are dated March 18, 1890. The note is for the sum of eight hundred dollars and was due in five years after date. The interest, at the rate of eight per cent, was payable semi-annually. Plaintiff applied for a loan to one Titus, a loan agent residing at Moorhead, and he procured the loan from defendant, a resident of New York. Her husband acted as her agent in making the loan, and he sent the money to Titus, who paid it over after said note and mortgage were executed. He then had the mortgage recorded, and sent it and the note to defendant's husband at New York. Defendant has ever since retained the principal note. As the coupon notes fell due, she sent them to Titus for collection. The note was, by its ¹⁸⁸ terms, payable at the office of Titus, in Moorhead. Until 1894, plaintiff paid the semi-annual interest to Titus shortly after it came due. Sometimes Titus had the interest coupon for collection when the payment was made, and at other times he did not, and then he would give plaintiff a receipt for the money, and, when the coupon arrived, he would exchange the coupon for the receipt.

Plaintiff paid Titus the following sums, to be applied on the principal note: March, 1891, one hundred dollars; April, 1891, three hundred and one dollars and eighty-eight cents; and April, 1893, three hundred dollars. On each occasion, Titus gave her a receipt for the amount paid, but he never forwarded

the amount paid to defendant, and never notified her that he had collected it, and neither she nor her husband ever knew until August, 1894, that any such payment had ever been made. When plaintiff made these payments, she never inquired whether Titus had the securities in his possession, and did not know whether he had or not. After making these payments, she supposed that she was entitled to a reduction of interest, but she still continued to pay the full amount of interest called for by the coupons. She "mentioned it to Mr. Titus, and he said it would be all right." She testified that she supposed that Titus was loaning his own money, and that he himself owned the note and mortgage. But she also testified that on three or four occasions, when she paid the interest, he did not have the coupon, and that she subsequently exchanged the receipt he gave her for the coupon, and she could readily see that all of the paid coupons which she received from him were payable to "Martha H. Cross." Titus testified that before he made this loan he had a conversation with defendant's husband at New York, and then solicited from the latter the authority to make loans for him, and that his (Titus') understanding of the agreement then made was that he should collect the principal and interest of such loans as he would make.

It will be observed that Titus received said three payments on the principal long before the note was due, and, conceding that the testimony warranted the court in finding that he had authority, as defendant's agent, to receive the principal of the debt, this did not give him authority to receive it before it was due: See *Mechem on Agency*, sec. 380; *Story on Agency*, sec. 98; 2 *Parsons on Notes and Bills*, 214; *Smith v. Kidd*, 68 N. Y. 130, 23 Am. Rep. 157; *Campbell v. Hassel*, 1 Stark. 233.

¹⁸⁹ "Every person who pays money beforehand pays it at his own risk. The agent could not have claimed the money before it was due to the principal": Per Lord Ellenborough in *Parnther v. Gaitskell*, 13 East, 432.

There was in this case no such course of dealing or other circumstances as would take the case out of the above rule. The case of *Thompson v. Elliott*, 73 Ill. 221, is not an authority in favor of respondent, as she contends. The note in that case was payable on or before.

Appellant commenced the foreclosure a few months before the principal came due, under the claim that there was a default in the payment of an installment of interest. Respondent

contends that the three payments made by her to Titus, as payments on the principal, should, at least, be applied pro tanto as a payment of this installment of interest, and, if so applied, there was no default in the mortgage when appellant attempted to foreclose it, and therefore the decision of the court below should be affirmed. Said three payments, made as payments on the principal, were all made long before this installment of interest came due, and we cannot hold, from the evidence, that Titus had authority to collect the interest before it came due, any more than he had authority to collect the principal before it came due. This disposes of the case.

The order appealed from is reversed, and a new trial granted.

AGENT'S AUTHORITY TO RECEIVE PAYMENT of an obligation does not authorize him to receive payment before it is due: *Smith v. Kidd*, 68 N. Y. 130, 23 Am. Rep. 157. A power to collect implies only an authority to demand and receive the thing due on an obligation: *Martin v. United States*, 2 T. B. Mon. 89, 15 Am. Dec. 129. No authority will be implied from an express authority: *Jackson v. Bank*, 92 Tenn. 154, 36 Am. St. Rep. 81.

STATE v. GREENWOOD.

[76 Minnesota, 211.]

FORGERY—INDICTMENT—SUFFICIENCY OF—"FORGE"—SIGNIFICATION OF.—While the gist of the crime of forgery is the intent to defraud, it is not necessary that the facts showing that intent should be specifically set out in an indictment for such crime, further than is included in the words "did feloniously forge" the instrument therein named. The word "forge," in such an indictment, is not a mere legal conclusion, but includes, in and of itself, a statement of the particular acts which constitute the crime.

FORGERY—CHARGING IN LANGUAGE OF THE STATUTE.—In a statutory indictment for forgery it is sufficient to charge the crime in the words of the statute.

FORGERY—INDICTMENT FOR—WHEN SUFFICIENT—ILLUSTRATION.—If an indictment charges that, on a certain day, at a certain place, the defendant, "with intent to defraud," did then and there feloniously "forge" a certain promissory note of the tenor following, and then sets it out in full, a "public offense" is charged, "in plain and concise language," and the defendant is sufficiently informed "of the nature and cause of the accusation against him," as required by law.

W. B. Douglas, attorney general, C. W. Somerby, assistant attorney general, G. W. Granger and Charles C. Willson, for the state.

Brown & Abbott and Stephen H. Somsen, for the defendant.

212 BUCK, J. The defendant, Greenwood, was indicted by the grand jury of the county of Olmsted of the offense of forgery. The indictment reads as follows:

"Ernest L. Greenwood is accused by the grand jury of the county of Olmsted, in the state of Minnesota, by this indictment, of the crime of forgery in the second degree, committed as follows: The said Ernest L. Greenwood, on the eighteenth day of December, A. D. 1897, at the city of Rochester, in the county of Olmsted and state of Minnesota, with intent to defraud, did then and there falsely and feloniously forge a certain promissory note of the tenor following:

"\$300.00.

Dec. 14, 1897.

"On or before one year after date we promise to pay to the order of Edward J. Grimm three hundred dollars, with interest at 7 per cent per annum, at ———, value received.

"E. L. GREENWOOD.

"C. E. GREENWOOD.

"No. ———. Due, ———."

"Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Minnesota.

"Dated at the city of Rochester, in the county of Olmsted and state of Minnesota, this twenty-first day of June, A. D. 1898.

JAMES CRAWFORD,

"Foreman of the Grand Jury."

The defendant demurred to the indictment, and upon a hearing the demurrer was overruled. The grounds of the demurrer are substantially included in the questions in the case as certified by the trial court to this court for its determination, upon motion and at the request of the defendant, as follows, viz.: 1. Does the indictment state facts sufficient to constitute a public offense? 2. Does the indictment contain a statement of the acts constituting the offense in plain and concise language? **213** 3. Does the indictment allege any act or fact constituting the crime of forgery, or is the word "forge," as used therein, a mere legal conclusion? 4. Does the word "forge," as used in the indictment, sufficiently inform the defendant of the nature and cause of the accusation against him?

The defendant contends that there is no allegation of the particular acts constituting the offense, no information vouchsafed to the defendant as to what he did, and no specification of the facts from which the grand jury drew the legal conclusion that he forged a certain document; and he invokes in his behalf the provision of the bill of rights that the accused shall be by the indictment informed of the nature and cause of the accusation against him, and that the statute of this state provides that an indictment shall contain a statement of the acts constituting the offense in plain and concise language. "Forgery" is the fraudulent making of a false writing which, if genuine, would apparently be of some legal efficacy: *State v. Rose*, 70 Minn. 403. And "forgery in the second degree," as defined by the General Statutes of 1894, section 6692, so far as material in this case, is as follows: "A person is guilty of forgery in the second degree who, with intent to defraud, forges . . . an instrument or writing, being or purporting to be the act of another."

The General Statutes of 1894, section 6701, provides that: "The expressions 'forge,' 'forged,' and 'forging,' as used in this chapter, include false making, counterfeiting, and the alteration, erasure, or obliteration of a genuine instrument, in whole or in part."

Now, what is the nature and the cause of the accusation in the indictment? The instrument so specifically described therein on its face contains all the essentials necessary to constitute a valid promissory note. It is alleged in the indictment that this apparently genuine instrument is a forged one; that the defendant forged it, with the felonious intent to defraud. If so, he made the note or instrument within the definition of the word "forge." A promissory note is a written promise to pay money at all events. There is no such thing as a verbal promissory note. This instrument in ²¹⁴ the indictment comes within the definition of a written promissory note. The indictment clearly, distinctly, and directly charges the defendant with having forged this instrument with intent to defraud. That is the charge against him, and, as he was entitled to be informed of the nature and cause of the accusation against him, we are of the opinion that he could and did find it quite easily in the charge in the indictment.

The gist of the offense of forgery is the intent to defraud. It is not necessary nor advisable to set out the name of the person intended to be defrauded. The elements of fraud to

be charged in the indictment, according to the law books, are a writing apparently valid, and evil intent on the part of the accused, and a false making of such writing. These matters are all charged in the indictment, which uses the word "forge," and it is claimed that this is not a statement of fact or facts, but simply a conclusion of law; and *Commonwealth v. Williams*, 13 Bush, 267, and *Stowers v. Commonwealth*, 12 Bush, 342, are cited to this effect, but we do not deem these decisions sound, and decline to follow them. The word "forge" contains a statement of fact, and not a mere conclusion of law, and includes the false making of an instrument, in whole or in part. If the word "forge" is broad enough to constitute a statement of fact and a conclusion of law, it nevertheless charges and covers a particular act, and sufficiently charges the commission of an offense in the words of the statute: *State v. Foster*, 30 Kan. 365. In *State v. Comfort*, 22 Minn. 271, it was held that: "A charge in an indictment may be made in the words of the statute, without a particular statement of facts and circumstances, when, by using those words, the act in which an offense consists is fully, directly, and expressly alleged, without any uncertainty or ambiguity."

The material portions of the indictment are in the language of the statute, and are sufficient: *People v. Harrold*, 84 Cal. 567. This rule is particularly applicable to the charge of forgery, where it is not necessary to set out in what particular act the forgery consisted, because the word "forge" or "forged" includes, in and of itself, a statement of the particular acts which constitute this particular offense. While forgery was a common-law offense, ²¹⁵ and a common-law indictment was a very lengthy document, full of technical and minute allegations of matter, yet the statute has in a great measure dispensed with this surplusage, and all that is now required by statute is that the indictment be direct and certain as to the party, the offense charged, and the particular circumstances of the offense charged, when necessary to constitute a complete offense, and it is sufficient, under a statutory indictment, to bring the offense fairly within the terms of the definitions of the offense: 9 Ency. of Pl. & Pr. 551.

In *People v. Rynders*, 12 Wend. 427, it was held sufficient to aver that the defendant forged a certain writing, describing it truly, and setting forth its tenor. And in *People v. Stearns*, 21 Wend. 409, it was held that, in cases of forgery, the indictment is good if it set forth the instrument alleged to have

been forged, averring it to have been falsely made, with intent to defraud some person or body corporate, provided the instrument be such on its face as to show that the rights of property of such person may thereby be impaired or affected. It is not necessary that the facts and circumstances of the case, showing the intent, should be specially set forth in the indictment. It is enough that they be given in evidence on the trial. Extrinsic facts are necessary to be stated only when the operation of the instrument upon the rights or property of another is not manifest or probable from the face of the writing: 1 Wharton's *Precedents of Indictments*, 264.

Our conclusion is that this indictment is good; that it was not necessary to set out therein the particular acts which constitute the crime of forgery, other than is included in the words "did feloniously forge" the promissory note therein fully described, which on its face appeared to be genuine, and to charge that such forgery was done with the intent to defraud. Hence, we answer questions Nos. 1 and 2 in the affirmative, and No. 3 that the indictment does allege a fact constituting the crime of forgery, and that the word "forge" therein is not a mere legal conclusion. And we answer question No. 4, and decide that the word "forge," as used in the indictment, in connection with the other facts therein stated, sufficiently informs the defendant of the nature and cause of the accusation against him.

²¹⁸ The order overruling the demurrer is affirmed, and cause remanded for further proceedings.

FORGERY—INDICTMENT—SUFFICIENCY OF.—An indictment following the language of the statute is generally sufficient: *Note to Meadowcroft v. People*, 54 Am. St. Rep. 469. The essential element of forgery consists in the intent to defraud, but it is not necessary to allege the name of the person intended to be defrauded: *State v. Warren*, 109 Mo. 430, 32 Am. St. Rep. 681; monographic note to *Arnold v. Cost*, 22 Am. Dec. 313, on forgery. The term "forged" in law indicates a fraudulent intent and purpose in making the writing: *Note to State v. Williams*, 47 Am. St. Rep. 258. An indictment for forgery is sufficient where the instrument alleged to be forged is set out by its tenor, and the indictment contains an allegation that the instrument was made by the defendant without lawful authority and with intent to defraud: *Howard v. State*, 37 Tex. Cr. Rep. 494, 66 Am. St. Rep. 812. A charge of forgery is sufficient if embodied in ordinary language in such a manner as to enable a person of common understanding to know what is intended: *State v. Johnson*, 28 Iowa, 407, 96 Am. Dec. 153.

BAGLEY v. PENNINGTON.

[76 Minnesota, 226.]

HOMESTEAD—ACQUIRING LIEN AGAINST, BY ATTACHMENT.—A lien on a homestead for an indebtedness incurred for labor and material furnished in building a house thereon may be acquired by levying an attachment on the homestead property as well as by docketing a judgment against it.

Action to enjoin a sale of land under execution. Article 1, section 12, of the constitution, as originally adopted, provided that: "A reasonable amount of property shall be exempt from seizure or sale for the payment of any debt or liability. The amount of such exemption shall be determined by law." In 1888, this section of the constitution was amended by adding thereto: "Provided, however, that all property so exempted shall be liable to seizure and sale for any debts incurred to any person for work done or materials furnished in the construction, repair, or improvement of the same; and provided, further, that such liability to seizure and sale shall also extend to all real property for any debt incurred to any laborer or servant for labor or service performed": See *Nickerson v. Crawford*, 74 Minn. 366, 73 Am. St. Rep. 354.

C. M. O'Neill, for the appellant.

Voris & Mathwig, for the respondents.

CANTY, J. At 9 A. M. an attachment was levied by defendants on eighty acres of land, the homestead of one Littlefield. On the same day he and his wife conveyed the premises to one Hoyt, who recorded his deed at 5 P. M. on that day. Hoyt subsequently conveyed to plaintiff, and thereafter judgment was entered and docketed in the attachment suit in favor of the plaintiffs therein and against Littlefield. Execution was issued on the judgment, and levied on the land, the sheriff proceeded to sell the same, and plaintiff brought this action to enjoin the sale. These defendants, in their answer, admitted all of the above facts, and alleged that the debt due to them from Littlefield, on which the judgment was entered, was incurred for labor and material furnished in building a house for him on his said homestead at a time when he so occupied it as such. To this answer plaintiff demurred, on the ground that the answer does not state a defense or counterclaim, and appeals from an order overruling the demurrer.

In our opinion, the order should be affirmed. Only one question is here raised which has not been effectually disposed of by *Nickerson v. Crawford*, 74 Minn. 366, 73 Am. St. Rep. 354, and that question arises by reason of a mere inadvertence in the language used in that ²²⁷ case. It was held in that case that the proviso added by amendment to section 12, article 1, of the constitution, is self-acting; that debts incurred for work done or materials furnished in construction, repair, or improvement on the homestead need not be enforced against it by mechanic's lien proceedings, but may be enforced against it by execution. It is further stated, at page 369 (74 Minn.), that: "So far as the constitution is concerned, debts of the enumerated classes only become liens on a homestead when reduced to judgment and docketed; and then they become liens on the homestead, the same as on any other real estate of the debtor."

It will be observed that, while the attachment in the case at bar was levied before the deed from Littlefield to Hoyt was recorded, the judgment was entered and docketed afterward, and appellant, relying on the language above quoted, contends that the attachment was no lien on the homestead of Littlefield, and that, as the conveyance from him was recorded before the judgment was entered, these defendants never acquired any lien on the land. The language above quoted was used with reference to the case then before the court, and it is plain, from reading the whole decision, that the question of whether or not a lien could be acquired by levying an attachment, as well as by docketing the judgment, was not in the mind of the court at all. On the clearest principles, there can be no doubt that such a lien can be acquired as well by levying an attachment as by docketing a judgment.

Order affirmed.

ATTACHMENT LIEN ON HOMESTEAD.—The levy of an attachment on land claimed as a homestead creates a lien thereon, which may be enforced by the judgment creditor when the homestead right ceases: *Brandon v. Moore*, 50 Ark. 247, 7 Am. St. Rep. 96; and compare the extended note to *Pipkin v. Williams*, 38 Am. St. Rep. 247. As to the liability of a homestead to mechanics' liens, see *Morgan v. Beuthein*, 10 S. Dak. 650, 66 Am. St. Rep. 733.

THOMAS v. THOMAS.

[76 Minnesota, 237.]

WILLS—ALTERATION OF, BY TESTATOR—PRESUMPTION.—When a portion of a will is canceled or erased by the testator himself, the presumption is that it was done with a view, and for the purpose, of substituting some other disposition of his property in place of that which is canceled or erased; and this presumption is just as strong when the words canceled or erased are wholly illegible as where they can still be read by an expert with the aid of a glass.

WILLS—ALTERATION OF, BY TESTATOR—FAILURE OF NEW DISPOSITION—EFFECT OF.—If a portion of a will is canceled or erased by the testator himself with a view to a new disposition of the property, which proposed disposition falls for want of authentication, the presumption in favor of a revocation by the cancellation is repelled, and the instrument will stand as originally framed, so far as it is practicable to ascertain what the former words were.

WILLS—ALTERATION OF—LEGIBILITY AND ILLEGIBILITY—DISTINCTION.—There seems to be nothing in the statutes relating to the execution or the revocation of wills which requires any distinction to be made between a cancellation or erasure which renders the words wholly illegible, and a cancellation or erasure which leaves the words still capable of being ascertained from an inspection of the document.

EVIDENCE—PROOF OF ALTERATION IN WILL BY PAROL.—Parol evidence is admissible to prove what canceled or erased words in a will were.

WILLS—ALTERATION OF, BY STRANGER, AND ITS EFFECT.—If erasures and alterations in a will were made by some third party, without the procurement of the proponent, they do not avoid the will, either in whole or in part, but it may be proved and established as executed.

WILLS—ALTERATION OF, BY PROPONENT, AND ITS EFFECT.—If erasures and alterations in a will were fraudulently made by its proponent, or by his procurement, the provisions of the will in his favor are thereby avoided.

WILLS—ALTERATION OF, WHILE IN TESTATOR'S POSSESSION—PRESUMPTION.—If a will has remained in the possession of the testator from the date of its execution until his death, and is then found among his papers with erasures or alterations, the presumption is that they were made by himself.

WILLS—ALTERATION OF BENEFICIARY'S NAME AFTER PUBLICATION—ADMISSION TO PROBATE.—If a will is presented for probate, but it conclusively appears that, after its publication, the name of a beneficiary, the testator's son and proponent of the will, was erased and the name of such son's wife inserted in place thereof, and it also appears that, if the change was made by the testator himself, it was never published or authenticated so as to make it operative, the court may admit the will to probate with the name of the wife omitted and the name of the son restored, where it is, under the evidence, justified in finding that the erasure and alteration were made either by the testator himself or by a stranger, and not by the proponent.

H. S. Bassett and Wells & Hopp, for the appellants.

Gray & Thompson, for the respondent.

²⁴⁰ MITCHELL, J. Ezekiel Thomas, of Fillmore county, in this state, died testate January 12, 1891, leaving, surviving him, a widow, Mary A., and four children, viz., Edward Thomas, the proponent, Hiram M. Thomas and Gabrilla Clark (now Colburn), the contestants, and John Thomas. On October 15, 1891, Edward Thomas proposed to the probate court as the last will and testament of the deceased an instrument dated June 4, 1888, the material provisions of which, after bequeathing and devising certain personal and real property to his wife for life, were as follows:

"Third. The rest, residue, and remainder of my estate, both real and personal, I give, devise, and bequeath equally, share and share alike, unto my children Hiram M. Thomas, Gabrilla Clark, nee Thomas, and Abbie Thomas.

"Fourth. At the date of the death of my wife I do hereby devise and bequeath, and it is my will, that all the property hereby bequeathed and willed to her be equally divided, share and share alike, between my children Hiram M. Thomas, Gabrilla Clark, nee Thomas, and Abbie Thomas."

Edward Thomas was named as executor. Abbie Thomas was not the daughter, but the daughter in law, of the testator, being the wife of the proponent, Edward.

The contestants interposed certain objections to the probate of the proposed instrument, among which were the following: 1. That after the death of the testator the proponent fraudulently altered the will by erasing and obliterating some other name whenever the name "Abbie" now appears, and writing in place thereof the word "Abbie." 2. Or, in case said alterations were not made since the death of the testator, then they were made by the testator himself, and the erasure revoked the devise and legacy to the person whose name was erased, but that the act of substituting the name "Abbie" was null and inoperative, because the alteration or addition was never authenticated as required by statute. They ²⁴¹ therefore consented that the name Abbie should be stricken out, but objected to the restoration of the name of any other person in place thereof. The probate court made an order or decree adjudging that the proposed instrument was the last will and testament of Ezekiel Thomas, "except that since the execution of said will the name of Edward Thomas has been erased,

and the name of Abbie Thomas inserted therein, as one of the legatees and devisees of said deceased," and ordering and adjudging "that the name Abbie Thomas is not properly in, or a part of, said will, and that said instrument be, and hereby is, corrected and reformed by restoring the name of Edward Thomas in lieu and instead of the name Abbie Thomas wherever it occurs in said will, and that the same, as corrected, be, and hereby is, established and allowed as the last will and testament of said Ezekiel Thomas, deceased, and that the same hereby is admitted to probate."

From this decree the contestants appealed, and, after trial *de novo* on the merits, the district court rendered judgment ordering and adjudging "that the order and judgment of the probate court admitting the will of Ezekiel Thomas to probate be, and is, in all things affirmed, and the will of Ezekiel Thomas, as proven, allowed, and established by the probate court is hereby declared to be the last will and testament of said Ezekiel Thomas."

Neither the probate nor the district court made any findings of fact other than those contained in their respective judgments, and none were asked for by either party. Hence, it must be assumed that the court found each and every fact necessary to support the judgment.

The evidence was conclusive that when the will was executed and published by the testator it contained the word "Edward" in both places where the word "Abbie" now appears, and that it did not contain the word "Abbie" at all; also, if the alteration was made by the testator himself, it was never authenticated or published, as required by the statute, so as to render it operative. Hence, the court, in rendering the judgment which it did, must have found either: 1. That the erasure and alteration were made by the testator ²⁴² himself, and that, as the alteration or addition in favor of Abbie was void for want of due authentication, it did not constitute a revocation of the devise and legacy in favor of Edward; or 2. That the erasure and alteration were made by some third party, and not by Edward, and hence did not affect the provisions of the will in his favor. If the judgment is sustainable on either ground, it must be affirmed.

The general rules of law applicable to the case are as follows: Where a portion of a will is canceled or erased by the testator with a view to a new disposition of the property, and the proposed disposition fails to be carried into effect, the pre-

sumption in favor of a revocation by the cancellation will be repelled, and the will will stand as originally framed, so far as it is practicable to ascertain what the former words were. Or, as sometimes stated, when words or clauses are canceled in order to substitute others, which fail for want of due authentication, the cancellation will be treated as relative and dependent upon the efficacy of the new disposition intended to be substituted; and hence, if the disposition intended to be substituted is inoperative, the revocation fails also, and the original will remain in force. This is based upon the presumption that the testator made the cancellation with the view and for the purpose of putting some other disposition of his property in place of that which is canceled, and that there is, therefore, no reason to suppose that he would have made the change if he had been aware that it would have been wholly futile, but that his wishes with regard to his property, as expressed in his original will, would have remained unchanged in the absence of any known and sufficient reason for changing them: *In re Penniman's Will*, 20 Minn. 220 (245), 18 Am. Rep. 368, and authorities cited.

This rule is entirely applicable to the facts of this case (assuming that the testator himself made the alteration), where he clearly intended to substitute a devise and bequest to Edward's wife for a similar one to Edward himself. It is not to be presumed that he would have revoked the devise to Edward except upon condition that the substituted one to his wife should be effectual. But it is urged that this rule is subject to the condition that the words attempted to be canceled or erased still remain legible in the will,²⁴³ so that they can be ascertained from the paper itself without resort to parol evidence; and much evidence was introduced on the trial of this case, with the aid of glasses and experts, as to whether the word "Edward" was still legible under the word "Abbie."

The text-books sometimes state the law to be as contended for by the contestants. The same statement is to be found in some of the adjudicated cases, but in every case which we have found the words canceled or erased were still legible, and hence the statement was mere dictum. In some of the cases the courts, as in the *Penniman* will case, state, apparently *ex industria*, that the words were still legible, but make no allusion to that fact in discussing the law of the case. We have never seen any reason given for attaching any such limitation or condition to the rule, and none has occurred to our minds. It seems

to us that the presumption as to the intention of a testator, upon which the rule already referred to is based, is just as strong when the words canceled or erased are wholly illegible as where they can still be read by an expert with the aid of a glass. Neither does the use of parol evidence to prove what the canceled or erased words were violate either the provisions of the statute of frauds or the rule that parol evidence is inadmissible to vary the terms of a written instrument. Nor can we discover anything in the statutes relating to the execution or the revocation of wills which requires any distinction to be made between a cancellation or erasure which renders the words wholly illegible, and a cancellation or erasure which leaves the words still capable of being ascertained from an inspection of the document.

Another rule of law applicable to this case is that if these erasures and alterations were made by some third party, without the procurement of the proponent, they would not avoid the will, either in whole or in part, but the will might be proved and established as executed. A third rule is that, if the erasures and alterations were fraudulently made by the proponent, or by his procurement, they would avoid the provisions of the will in his favor, and the will should have been admitted to probate with the places where the name was erased left blank. This rule is established "in odium spoliatoris."

The evidence is to the effect that from the time the will was executed, ²⁴⁴ in June, 1888, until his death, in January, 1891, the testator retained possession of the will, and kept it under lock in a desk in his bedroom, and that he carried the key of the desk. So far as appears, the first member of his family who knew of the existence of the will was his wife, whom he told shortly before his death where she would find it in the desk, in case of his death. The family consisted of the testator and his wife, Mary, his son Edward, and his wife, Abbie, and a grandson. These continued to reside in the house up to the time the will was presented for probate; and during all that time the will was kept in the desk, the key to which was left in another drawer of the same desk, so that, apparently, any member of the family could have had access to the will. Shortly after his father's death, the proponent and his wife moved into and occupied as their bedroom the room in which the desk was. The disinherited son, John, and his wife, Jessie, came from the west shortly after the testator's death, and remained in the house some ten days or more. During that

time, and about January 23d, the will was taken out of the desk by the widow for the purpose of being read to or by the members of the family. So far as appears, this was the first time any of them had seen it.

According to the testimony of Edward, it was read aloud by him, and then passed to John to read. According to Edward, he and John and his mother were the only persons present at this time. According to John and his wife, Jessie, the latter was also present, and read it; and in this they seem to be corroborated by the grandson, who was called as a witness by Edward. John and his wife both testified positively that they both read the instrument at that time, as well as heard it read, and that it contained the name of Edward in both places where the word "Abbie" now appears, and that there were no erasures. The mother testified that she did not remember and could not tell whether the name of Edward or of Abbie was then in the will. Abbie, the proponent's wife, was not called as a witness. Edward testified that the will was in the same condition as now, and contained the name "Abbie" as one of the beneficiaries; but the weight of his evidence is somewhat impaired by the somewhat indefinite and vague character of his answers, on cross-examination, as to matters about which he would naturally ²⁴⁵ be quite positive, and his admission, in substance, that the fact of the existence of the erasures, and that his name was omitted from the will, and his wife made a beneficiary, elicited neither surprise, comment, nor inquiry on his part. He testified that he did not write the word "Abbie," that it was not in his handwriting, and that he did not know whose it was. Aside from this, there was no evidence introduced by either side as to whose handwriting the word "Abbie" was. Neither party attempted to prove that it was or was not that of the testator.

On January 26th, in writing to his brother Hiram, who lived west, Edward, after stating what provision the will made for his mother, added, "There will be one hundred and ninety acres to be divided between you, Gabrilla and myself," and made no reference to his wife, Abbie, being one of the beneficiaries. About February 16th, Edward, at the request of Hiram, sent the latter a copy of the will. In making this copy, Edward wrote it as read aloud to him by his wife, Abbie. This copy contains the name of Edward, and not of Abbie, as one of the beneficiaries of the will. The reason assigned by Edward why he inserted his own name instead of his wife's was that

when they came to that part of the will she requested him to do so. The testimony of the probate judge was to the effect that when the will was presented to him by Edward he observed the erasures, and called Edward's attention to the fact, to which the latter made no response. Also that the word "Abbie" seemed fresher than the balance of the instrument. It appeared that at the time of the death of the testator, and up to a time subsequent to the presentation of the will for probate, there were two or three unsatisfied judgments against Edward; and the suggestion of the contestants is that the motive of Edward in making the alteration was to prevent these judgments from becoming a lien on the land devised to him.

This statement of the evidence is not complete, but is sufficient to give a fair idea of its probative force. We confess that it seems to us that the preponderance of the evidence, largely circumstantial, was against the proponent, and in favor of the conclusion that he himself intentionally made the erasures and alterations. But it was not conclusive, especially in view of his own testimony. If ²⁴⁶ the court believed his testimony, then it was justified in concluding that the erasures and alterations were made by the testator in his lifetime; for where a will has remained in the possession of the testator from the date of its execution until his death, and is then found among his papers with erasures or alterations, the presumption is that they were made by himself. Or, again, even if the court did not find that the erasures and alterations were made by the testator, it might have found, if it believed the proponent's testimony, that they were not made by him, or by his procurement, but by some third party. Inasmuch as to find that the proponent made them would have resulted in his forfeiting all benefits under the will, and would, in effect, amount to finding him guilty of the crime of forgery, the evidence ought to be quite clear and satisfactory in order to justify such a finding. In view of all these considerations, we cannot say that the findings were so manifestly against the weight of the evidence that it was an abuse of discretion on the part of the trial court to refuse to grant a new trial.

Order affirmed.

WILLS — ALTERATION OF — PRESUMPTION.—An ineffectual attempt to alter a will does not operate as a revocation: *Greer v. McCrackin, Peck*, 801, 14 Am. Dec. 755. The testator cannot alter it otherwise than by an instrument attested in the same manner as is required by law to give effect to the will: *Note to Thayer v.*

Wellington, 85 Am. Dec. 761. The republication of a will must be made with like solemnity as the execution of the original will: Note to *Pickens v. Davis*, 45 Am. Rep. 332. Those parts of a will which have been erased by a testator are no more a part of such will than if they had never been written therein: See *Lurie v. Radnitz*, 166 Ill. 609, 57 Am. St. Rep. 157. All erasures, alterations, interlineations, and mutilations of a will are presumed, until explained, to have been made after the will was executed. And when a will was in the custody of the decedent, and is found, after his death, bearing upon it evidence of such acts of mutilation or of obliteration as are requisite and sufficient to revoke it, its condition will be presumed to have been the work of the testator, done with intent to effect its revocation. This presumption must prevail, unless overcome by satisfactory and competent evidence: See monographic note to *Graham v. Burch*, 28 Am. St. Rep. 351, on the revocation of wills; *Bennett v. Sherrod*, 3 Ired. 303, 40 Am. Dec. 410.

WILLS.—EXTRINSIC EVIDENCE to show circumstances under which changes or interlineations were made: See monographic note to *Chappell v. Missionary Soc.*, 50 Am. St. Rep. 286, on extrinsic evidence to explain wills.

WILLS—ALTERATIONS NOT SUPERSEDING PROVISIONS OF—PROBATE.—An interlineation in a will, after it has been duly executed and attested, though made in the presence of the testator and that of the witnesses to the will, there being no further signing by him nor attestation by them, has no effect whatever on the will: *Hesterberg v. Clark*, 166 Ill. 241, 57 Am. St. Rep. 135. In some of the states, their statutes have been construed as requiring a revocation by obliteration, mutilation, or cancellation to be of the whole will, and therefore their courts disregard erasures or other obliterations intended to affect only some part or clause of a will; but except where statutes are in force to which this construction has been or must be given, the obliteration or mutilation of a will may be partial as well as total, and where any clause is by any means so obliterated that it can no longer be read, it is revoked, and the will must be admitted to probate without it: Note to *Graham v. Burch*, 28 Am. St. Rep. 350. See *Bigelow v. Gillott*, 123 Mass. 102, 25 Am. Rep. 32, and extended note thereto.

BOLLINGER v. WILSON.

[76 Minnesota, 262.]

SALES ARE CONSUMMATED AND EXECUTED UPON DELIVERY AND TRANSFER OF TITLE.—Hence, where liquor is sold to be delivered f. o. b. the cars at a certain place, it becomes the property of the purchaser when it is delivered at such place to the carrier, who, for the purposes of delivery, represents the purchaser.

INTOXICATING LIQUORS—PLACE OF SALE—CONFLICT OF LAWS—ILLEGAL SALE—RECOVERY OF CONSIDERATION. In a Minnesota action to recover the possession of a note held by an attorney for collection, but which was given by the plaintiff, in Iowa, in payment for beer ordered in that state, and where the liquor was delivered in Wisconsin, and shipped from the latter state

to Iowa, under a contract made with a view of evading the liquor laws of Iowa, and was there sold, without a permit, contrary to the laws of that state, the court is not justified in directing a verdict for the plaintiff, though, under the statutes of Iowa, any consideration paid or security given on account of an illegal sale of intoxicating liquor in that state might be recovered. The plaintiff is not, under the Iowa statute, entitled to recover the note, as the sale was made in Wisconsin and not in Iowa, and it is only in the case of an Iowa sale that the purchaser can recover the consideration paid under the statute of that state.

George W. Wilson & Son, for the appellant.

A. J. Daley and J. M. Parsons, for the respondent.

294 MITCHELL, J. This was an action to recover the possession of a promissory note.

The undisputed evidence was that in August, 1893, an "agent" of the Schlitz Brewing Company, of Milwaukee, Wisconsin, interviewed the plaintiff at Rock Rapids, Iowa, the place of his residence, and suggested that he engage in the business of selling beer at that place, and solicited him to buy beer for that purpose from the Schlitz Brewing Company, advising that it be shipped in the fictitious name of "Paul Bodenbach," in order to avoid his getting into trouble for violating the laws of Iowa. Thereupon the plaintiff executed and delivered to the agent, whose name was Oscar Schmidt, the following instrument:

"Jos. Schlitz Brewing Company, Bottling Department.

"Order No. ———.

Aug. 21, 1893.

"Ship ——— to Geo. Bollinger, Rock Rapids, Iowa, via Ills. Central R. R. 10 casks qts. Pilsener @ \$8.00; 20 cases qts. Pilsener @ \$2.75; 10 $\frac{1}{4}$ -kegs beer @ \$5.25; 150 $\frac{1}{4}$ -kegs beer at per bbl.; 15-8 kegs beer. F. o. b. cars at Milwaukee.

"Allowance for empty bottles delivered at Milwaukee free of charge and in good order: Per doz. qts., 48c.; per doz. pts., 36c.; for each case, 25c. No allowance for barrels. Terms: Credit, one car.

OSCAR SCHMIDT,

"Agent.

"Above prices and terms accepted herewith.

"GEORGE BOLLINGER.

"Memorandum: Ship car Paul Bodenbach name."

At the same time and place, and as a part of the same transaction, the plaintiff transferred to the brewing company, and delivered to the agent, the note in controversy as security for the payment ²⁹⁵ of the purchase price of the beer, and subse-

quently the brewing company transferred it to a bank, which sent it to the defendant, as an attorney at law, for collection. The brewing company subsequently shipped the beer at Milwaukee to the plaintiff at Rock Rapids, Iowa, in accordance with the terms and conditions of the written instrument already set out. In due course of time, the plaintiff received it and sold it. He had no permit, under the statutes of Iowa, to sell any intoxicating liquors in that state, and it does not appear that the brewing company had any. The nature or extent of the agent's authority does not appear, except that it may be inferred, from the brewing company's recognition of the "order" or "contract," whichever it may be called, and shipping the beer in accordance with its terms, that he had authority to take such orders or make such contracts. The plaintiff's claim was that the sale of the beer was made in Iowa, and that, under the statutes of that state, it was illegal, and any consideration paid or security given on account of the sale could be recovered.

Counsel have raised and discussed several points; but, under our view of the case, it is necessary to consider one of them only, viz., whether plaintiff made out a case entitling him, under the Iowa statute, to recover the note in controversy. The only provisions of the Iowa statutes introduced in evidence and contained in the record are sections 2359, 2360, 2362, 2369, 2372, 2381, 2400, 2407, and 2416 of McClain's Code of that state. Section 2359 provides that: "No person shall . . . sell, by himself, his clerk, steward, or agent, directly or indirectly, any intoxicating liquors except as hereinafter provided."

This refers to permits which may be obtained for selling for certain specified purposes not here material. Section 2381 provides that: "If any person not holding such a permit, by himself, his clerk, servant or agent, shall for himself or any person else, directly or indirectly, or on any pretense or by any device, sell . . . any intoxicating liquors, he shall . . . be deemed guilty of a misdemeanor," etc.

Section 2407, which is the one upon which plaintiff principally relies, provides that: ²⁰⁸ "All payments or compensation for intoxicating liquor sold in violation of this chapter, whether such payments or compensation be in money, goods, land, labor or anything else whatsoever, shall be held to have been received in violation of law and against equity and good conscience, and to have been received upon a valid promise and agreement of

the receiver in consideration of the receipt thereof to pay on demand, to the person furnishing such consideration the amount of said money or the just value of such goods, land, labor or other thing."

We find no other provisions in the statute having any material bearing on the question under consideration. The plaintiff must find his right to recover, if at all, in the clear and express terms of this statute, which, being penal in its nature, must be strictly construed. Construing most favorably to the plaintiff the written memorandum delivered by the plaintiff to the agent, not as a mere "order" for the liquor, subject to the approval and acceptance of the brewing company, but as a valid executory contract between the parties, it is nevertheless evident from its terms that it was a contract for the delivery of beer at Milwaukee. The brewing company was to deliver it, not at Rock Rapids, Iowa, but free on board the cars at Milwaukee. The liquor became the property of the purchaser when it was delivered at Milwaukee to the carrier, who, for the purposes of delivery, represented him. Until that was done, the agreement to sell was merely executory. To constitute a sale, under this statute, there must be a transfer of the title. Delivery, either actual or constructive, was essential to a sale. Therefore, upon the facts, the sale was made—that is, consummated and executed—by delivery and transfer of title in Wisconsin, and not in Iowa. Neither the brewing company nor its agent could have been convicted, under section 2381, of selling in Iowa without a permit. Authorities to this effect are abundant, but we need cite but one—*Garbracht v. Commonwealth*, 96 Pa. St. 449, 42 Am. Rep. 550. For the same reason, under the strict construction which the statute must receive, it is only in the case of an Iowa sale—that is, a sale consummated and executed in Iowa by a delivery and transfer of title in that state—that the purchaser can recover the consideration paid under section 2407.

There is evidence that the brewing company, or at least its agent, not only knew that this liquor was to be resold by the plaintiff ²⁰⁷ in Iowa, contrary to its laws, but in fact solicited him to engage in this unlawful traffic, and actively assisted him in doing so by shipping the liquor to him by a fictitious name. A sale in Wisconsin, under these circumstances, might not support an action for the purchase price of the liquor: See *Graves v. Johnson*, 156 Mass. 211, 32 Am. St. Rep. 446. This would not be because of any provision to that effect in the

Iowa statute, but on the general doctrine that the right to contract with a view to a breach of the laws of another state ought not to be recognized, or the contract enforced, by the courts of other states, and that they will refuse to aid either party, and leave them where they find them. But this involves a very different principle from the present case, where one of the parties to the illegal transaction is seeking the aid of the court to recover what he has paid on this contract.

It is further urged by the plaintiff that, independently of the Iowa statutes, he was entitled to recover because it appeared that he had fully paid for this carload of beer, and was therefore entitled to a return of this note which he had transferred as collateral security. There is evidence tending to prove that the arrangement between the plaintiff and the agent of the brewing company contemplated future sales from time to time as plaintiff's business might require; that future like sales were made, for one of which the plaintiff has not paid. The evidence is indefinite and equivocal as to whether this note was turned in as collateral security only for the payment of the first carload ordered by the plaintiff, or as a standing and continuing security for the payment of any future orders made in the course of plaintiff's business. Under this state of the evidence, the court was not justified in directing a verdict in favor of the plaintiff.

Order reversed and a new trial granted.

In *Theo. Hamm Brewing Co. v. Young*, 76 Minn. 246, the plaintiff was doing business in Moorhead, Minnesota, and the defendant resided in Fargo, North Dakota. Young ordered, by telephone, a quantity of beer to be delivered by the company to him in Fargo, North Dakota, which was done. The sale was held to have been made in North Dakota. "There," said the court, "is where delivery to the purchaser was to be made, according to his order, and was in fact made, and then, and not till then, the title passed to the purchaser. Until then there was not even an executory contract for the sale of the beer, nothing except an unaccepted order for the goods by Young." The laws of North Dakota prohibited the sale of beer, except by licensed druggists and pharmacists, and, such sales being void, payment therefor could not be enforced. It was therefore held that no action could be maintained in Minnesota to recover the price of the beer ordered by Young.

SALES—PLACE OF.—DELIVERY TO A CARRIER is equivalent to a delivery to the purchaser, especially when, by the terms of the contract of sale, the goods were to be delivered to the carrier: *Scharff v. Meyer*, 133 Mo. 428, 54 Am. St. Rep. 672. If goods are sold to be delivered f. o. b. at a place designated, and they are so delivered, consigned to the purchaser, property therein at once vests in him: *Capehart v. Furman Farm etc. Co.*, 103 Ala. 671, 49 Am. St. Rep. 60.

INTOXICATING LIQUORS—PLACE OF SALE—CONFLICT OF LAWS—ACTION FOR PRICE.—A sale of intoxicating liquor, ordered by express, is complete, and property passes to the purchaser when the liquor is delivered to an express agent for transportation: *State v. Flanagan*, 38 W. Va. 53, 45 Am. St. Rep. 836. The sale and delivery of liquors in Massachusetts with a view of having them resold by the purchaser in Maine, in violation of the laws of the latter state, will not sustain an action in the former state for the price agreed to be paid for such liquors: *Graves v. Johnson*, 156 Mass. 211, 32 Am. St. Rep. 446.

SPOONER v. TRAVELERS' INSURANCE COMPANY OF HARTFORD.

[76 Minnesota, 311.]

CREDITOR'S SUIT TO REACH EQUITABLE ASSETS—PLEADING—EVIDENCE.—In a creditor's suit brought to reach equitable assets which the debtor has fraudulently transferred, the plaintiff must allege and prove that he has no legal remedy, and that the debtor is insolvent, and has no other property from which his debt may be satisfied. The best, and, as a rule, the only, evidence of these facts is the return of an execution nulla bona.

FRAUDULENT CONVEYANCE—ACTION BY LIEN HOLDER TO SET ASIDE—PLEADING—EVIDENCE.—When a creditor has acquired a legal lien on his debtor's property, and brings suit to set aside a transfer of such property as in fraud of creditors, he is not bound to allege or prove that the debtor has no other property out of which the debt can be satisfied, or that the debtor is insolvent, or that an execution has been returned unsatisfied. He is required only to show that he has a lien on the property, the enforcement of which is obstructed by the fraudulent transfer, for he has the right to be placed in the same position which he would have occupied had the transfer never been made.

FRAUDULENT CONVEYANCE—ACTION BY JUDGMENT CREDITOR TO SET ASIDE—COLLATERAL SECURITY.—In an action brought by a judgment creditor to set aside a transfer of his debtor's property as in fraud of creditors, the mere fact that he has, since the commencement of such action, taken collateral security for the payment of the judgment, with other indebtedness, does not, without any finding that the security is adequate, raise any equity in favor of the defendant, the fraudulent grantee, to compel the plaintiff to first resort to his collateral security before enforcing the lien of his judgment.

John P. Rea, Marshall A. Spooner, and Charles L. Shelley, for the appellant.

William C. Bicknell, Fred E. Smith, and S. A. Flaherty, for the respondent.

³¹³ **START, C. J.** This was an action by the plaintiff, a judgment creditor, to set aside a foreclosure of a real estate

mortgage on the ground that the sale was fraudulent as to the mortgagor's creditors. The trial court made its findings of fact, in which was included the special finding of the jury on the issue of fraud, and, as a conclusion of law, found that the plaintiff was not entitled to any relief, and ordered judgment for the defendant on the merits. Judgment was so entered, and the plaintiff appealed. The record contains no settled case or bill of exceptions, and the assignments of error are to ³¹⁴ the effect that the conclusions of law and judgment are not supported by the facts found.

The trial judge and jury found substantially these facts: On and prior to April 15, 1886, Mary J. Walker was the owner of the section of land described in the complaint, and on that day executed to the defendant her promissory note, and thereby promised to pay to it the sum of five thousand dollars in five years, with interest payable annually at the rate of eight per cent per annum. She and her husband executed a mortgage on her land to secure the payment of the note. Default was made in the payment of the mortgage debt, and the defendant proceeded to, and did, foreclose the mortgage by advertisement, and purchased the mortgaged premises at the foreclosure sale on May 4, 1895. The usual certificate of sale was executed to it by the sheriff, which was duly recorded. The defendant intentionally included in its notice of mortgage sale, and bid at the sale, an amount exceeding by at least two hundred dollars the amount actually due on the mortgage in question, pursuant to an agreement with the mortgagors to do so for the purpose of hindering and deterring bidders at such sale, and preventing and deterring subsequent lien holders from redeeming from such sale.

The mortgagors were at this time indebted to the plaintiff in the sum of three hundred and twenty-nine dollars, for which he thereafter, on July 29, 1895, recovered a judgment against them. The judgment was duly docketed in the county wherein the mortgaged premises are situated. The judgment has never been paid, but after the commencement of this action the judgment debtors executed a chattel mortgage on personal property owned by them, for the purpose of securing the payment of the judgment and other indebtedness, amounting in all to the sum of two thousand dollars, and also, for the same purpose, assigned to him certain school land certificates. The value of the property covered by the chattel mortgage, or of

the certificates, was not proved. The plaintiff did not show that he had attempted to satisfy his debt from this collateral security, or that he was unable to collect his judgment by a levy upon property other than the land covered by defendant's mortgage. With respect to the amount claimed in the notice of sale in excess of the sum actually due, the trial judge incorporated the following statement in his finding: ³¹⁵ "The court has not gone carefully into the evidence on the subject of payments, and does not find the correct amount of such excess, because the correct or precise amount is not deemed material."

It also appears from the trial court's memorandum that the basis of its conclusion of law was that the action is, in effect, one to set aside a fraudulent transfer of the debtor's property, and subject it to the payment of his debt; that, to maintain such an action, the creditor must show that he has no other remedy at law; and that in this case it was not shown that the debtor was insolvent, or that she had not other property out of which the plaintiff might collect his debt, or that his collateral security was inadequate. This is also the ground upon which the defendant's counsel seek, on this appeal, to justify the conclusions of law of the trial court; but they further insist that the plaintiff was bound to show that the mortgaged premises were worth more than the encumbrance at the time of the foreclosure sale. If the plaintiff was bound to show these matters before he would be entitled to have the transfer set aside, it necessarily follows that the conclusions of law of the trial court are sustained by the findings of fact, for there were no findings as to such matters.

Where a creditor's suit is brought to reach equitable assets which the debtor has fraudulently transferred (that is, property to which he has no legal title whatever, but only an equitable interest), the plaintiff must allege and prove that he has no legal remedy; that the debtor is insolvent, and has no other property from which his debt may be satisfied. The best, and, as a rule, the only evidence of these facts, is the return of an execution nulla bona. In such a case the creditor's legal rights have not been affected by the fraudulent transfer, and, before a court of equity will set it aside, the creditor must show that it has jurisdiction, by establishing the fact that he has no adequate remedy at law for the collection of his debt, or, in other words, that he has no way of securing payment of his debt except out of the debtor's equitable assets. But where the plaintiff has acquired a legal lien on property of his debtor,

and the suit is one to set aside a transfer thereof made for the purpose of defrauding creditors, which is an obstruction or impediment in the way of the plaintiff's enforcing his legal right to subject the ²¹⁶ property to his lien, he has the right to be placed in the same position which he would have occupied had the transfer never been made; and the grantee, because of the fact that his title is tainted with fraud in fact, has no right to say that all other means to satisfy the debt shall be exhausted before he shall be disturbed in his title. Hence, in such an action, the plaintiff is not bound to allege or prove that the debtor has no other property out of which the debt can be satisfied, or that the debtor is insolvent, or that an execution has been returned nulla bona.

The statute (Gen. Stats. 1894, sec. 4222) makes all such conveyances void as to creditors, irrespective of the question whether the debtor has other property; and, when the creditor once acquires a lien on the property so transferred, the lien itself is sufficient to confer jurisdiction upon a court of equity to set aside the transfer as an obstruction to the enforcement of the plaintiff's legal rights: 5 Ency. of Pl. & Pr. 498; 2 Bigelow on Frauds, 80; Bump on Fraudulent Conveyances, sec. 552; Wadsworth v. Schisselbauer, 32 Minn. 84; Gorton v. Massey, 12 Minn. 83 (145), 90 Am. Dec. 289, note; Weigtman v. Hatch, 17 Ill. 281; Vasser v. Henderson, 40 Miss. 519, 90 Am. Dec. 351; Gray v. Chase, 57 Me. 558; Westerman v. Westerman, 25 Ohio St. 500; Gormley v. Potter, 29 Ohio St. 597.

The distinction between a creditor's bill proper, to reach equitable assets of the debtor, and an action to set aside a transfer of land fraudulent in point of fact, which is an obstruction to the enforcement of the creditor's legal lien on the property, is well defined. In the former case the creditor must show that he has no other remedy, but in the latter he is required only to show that he has a lien on the property, the enforcement of which is obstructed by the fundamental transfer. Purely voluntary conveyances, where no fraud in point of fact was intended, seem to be an exception to this rule. The distinction is well shown in Wadsworth v. Schisselbauer, 32 Minn. 86, in which it is said: "In the latter class of cases, the prevailing doctrine is that it is not necessary to allege that an execution has been returned unsatisfied, or that the debtor has no other property out of which the judgment can be satisfied; for that is not the ground upon which the court of equity assumes to

grant relief in such cases, but upon ³¹⁷ the theory that the fraudulent conveyance is an obstruction which prevents the creditor's lien from being efficiently enforced upon the property. As to him the conveyance is void, and he has a right to have himself placed in the same position as if it had never been made. The fact that other property has been retained by the debtor may be evidence that the conveyance is not fraudulent; but, if the grantee's title be tainted with fraud, he has no right to say that all other means to satisfy the debt shall be exhausted before he shall be disturbed."

In *Botsford v. Beers*, 11 Conn. 369, 375, the court, with reference to this subject, said: "And we have yet to learn that it is any defense, either at law or in chancery, that there are other lands which might have been taken, and that the debtor is not insolvent. All this may be very proper evidence to show that the conveyance was not fraudulent. But upon what principle it is that these facts can be set up by a fraudulent grantee to protect a conveyance admitted to be fraudulent we are at a loss to discover."

The case of *Johnston v. Piper*, 4 Minn. 133 (192), relied on by the defendant in support of the claim that plaintiff was bound to show that the debtor had no other property from which his debt might be satisfied, is not in point. What was said in this respect in the opinion in that case was dictum—a statement of the rule as to creditor's bills proper, to reach equitable assets.

It is practically conceded, as it must be, that the facts found by the trial court, and the verdict of the jury, show that the foreclosure sale in this case was in fact fraudulent as to creditors, and therefore void as to them. The plaintiff was a creditor of the mortgagor at the time of the sale, and acquired a legal lien on the land so transferred, by docketing his judgment; and he brought this action to remove the fraudulent conveyance, as an obstruction to the enforcement of his lien. He has the right to be placed in the same position as he would have occupied if the transfer had never been made, and the findings and verdict are sufficient to entitle him to that relief. The fact that the findings do not include a finding that the debtor has no other property, and is insolvent, affords no ground for denying to plaintiff such relief. The mere finding that since the commencement of this action the plaintiff has taken collateral ³¹⁸ security for the payment of the judgment, with other indebtedness, without any finding that the secur-

ity is adequate, does not raise any equity in favor of the defendant, the fraudulent grantee, to compel the plaintiff to first resort to his collateral security before enforcing the lien of his judgment. It is familiar law that the holder of collateral security is not confined to such security, but may make his debt out of any of the debtor's unexempt property, unless special facts are shown rendering it inequitable to permit him to do so: See 5 Ency. of Pl. & Pr. 530.

Lastly, it is claimed by the defendant that the findings are insufficient to entitle the plaintiff to any relief, because there is no finding that the property upon which the plaintiff's judgment is a lien was worth more than the amount of the prior mortgage thereon, and that the burden of establishing this fact was upon the plaintiff. Counsel, in support of this claim, rely upon the cases of *Baldwin v. Rogers*, 28 Minn. 544; *Horton v. Kelly*, 40 Minn. 193; *Aultman etc. Co. v. Pikop*, 56 Minn. 531. It is urged on behalf of the plaintiff that these cases are unsound in principle, and ought to be overruled, if the court holds that they are applicable to this case. It is not necessary to determine whether the doctrine of the case of *Baldwin v. Rogers*, 28 Minn. 544, and the cases following it, is correct on principle, or not, for the findings do not bring this case within it. The doctrine of the cases referred to, as stated in the opinion in *Baldwin v. Rogers*, 28 Minn. 550, is this: "If . . . it is beyond question that the encumbrances exceed the value of the property, so that there is nothing left . . . from which to exclude his creditors, they are not injured or defrauded; and as the conveyance, therefore, in no way affects them, it is not fraudulent as to them, and they cannot have it set aside."

There is no finding in this case that the amount of the mortgage exceeded the value of the land. On the contrary, the trial court found that it sold at the foreclosure sale for a sum exceeding the amount due on the mortgage by at least two hundred dollars. Therefore, the findings do not bring this case within the doctrine of *Baldwin v. Rogers*, 28 Minn. 544.

Our conclusion is that, upon the findings in this case, the plaintiff ³¹⁰ is entitled to have the foreclosure sale set aside as to him, thereby placing him in the exact position in which he would have been if the fraudulent sale had never been made. The sale is valid as between the mortgagor and mortgagee.

It is therefore ordered that the judgment appealed from be reversed, and the cause remanded, with direction to the district

court to amend its conclusions of law, to the effect that the plaintiff is entitled to judgment setting aside the foreclosure sale as to him only, and enter judgment accordingly.

CREDITOR'S SUIT BY LIEN HOLDER TO SET ASIDE FRAUDULENT CONVEYANCE.—To enable one to file a creditor's bill, he must, as a rule, have exhausted all his legal remedies; though, without having done so, he may have a standing to file a creditor's bill if he is in the position of a creditor with a lien: See monographic note to *Ladd v. Judson*, 66 Am. St. Rep. 272, 274, treating of the demands which will support a creditor's bill. It is considered that when a creditor has reduced his claim to judgment, he has sufficiently exhausted his legal remedies to entitle him to file a creditor's bill to set aside fraudulent conveyances which obstruct the satisfaction of his judgment. The issue of execution and return thereof are generally dispensed with in such cases: Note to *Ladd v. Judson*, 66 Am. St. Rep. 287. Compare the dissenting opinion to *Gilbert v. Stockman*, 29 Am. St. Rep. 930.

CAPITAL FIRE INSURANCE COMPANY v. WATSON.

[76 Minnesota, 387.]

BOND OF INSURANCE AGENT—ACTION ON—EVIDENCE—RES GESTAE.—If a person, appointed by an insurance company as its agent, gives a bond for the faithful performance of his duties, and an action is brought thereon to recover a balance due for premiums claimed to have been collected by him, his reports to the company, made in the usual course of business, are a part of the *res gestae*, and are admissible in evidence.

BOND OF INSURANCE AGENT COVERS WHAT.—A bond given by an insurance agent for the faithful performance of his duties covers insurance premiums collected by him, which he fails to pay over to the company.

BOND OF INSURANCE AGENT—ACTION ON—DEFENSE FOR SURETIES—KNOWLEDGE OF FORMER DISHONESTY.—If an insurance company takes a person for its agent, but exacts a bond for the faithful performance of his duties, it impliedly represents that, so far as it knows, such person is honest and that it believes him to be so. If, at this time, it knows that he has been dishonest and a defaulter as the agent of another company, but fails to disclose such knowledge to the sureties, it perpetrates a fraud on them, which they may plead in defense to an action on the bond.

BOND OF INSURANCE AGENT—ACTION ON—DEFENSE FOR SURETIES—DISHONESTY WITHOUT NOTIFICATION.—If an insurance company takes a person for its agent, but exacts a bond for the faithful performance of his duties, and such employment may be terminated, at any time, by either party, allegations that the company, during the course of the employment, knew that the agent wrongfully converted its moneys to his own use, but that, after such knowledge, the company continued him in its service without notifying the sureties of his dishonesty, state, *pro tanto*, a defense for them in an action on the bond.

Am. St. Rep. Vol. LXXVII.—42

Action on a bond executed by Watson, as principal, and by the defendants, Haag and Reese, as sureties.

Charles J. Berryhill, for the appellant.

Clapp & Macartney, for the respondent.

CANTY, J. On May 8, 1897, the defendant Watson was appointed by the plaintiff insurance company as its agent at St. Paul. To secure the faithful performance of his duties, he, as principal, and the other defendants as sureties, executed to plaintiff a bond in the sum of one thousand dollars. The conditions of the bond are, in part, that Watson "shall duly and properly account for, pay over, and apply all sums of money which may be received by him as such agent, whether for premiums of insurance, or with which to pay losses, or upon salvages, collections, or otherwise . . . and shall keep true and correct books of account, and make regular and correct reports of the business transacted by him to the said company."

Watson continued to be the agent of plaintiff from May 8 to ~~28~~ August 28, 1897, and this action is brought on the bond to recover a balance claimed to be due from Watson for premiums which it is claimed he collected as such agent. On the trial, the court ordered a verdict for plaintiff, and from an order denying a new trial the defendant Haag appeals.

1. The court correctly received in evidence the reports made by Watson to plaintiff. They were made in the usual course of business, it was a part of his duty as such agent to make these reports, and they are a part of the *res gestae*: See *Lancashire Ins. Co. v. Callahan*, 68 Minn. 277, 64 Am. St. Rep. 475.

2. The evidence is conclusively in favor of the verdict ordered by the court, and therefore the court did not err in ordering the verdict. There is nothing in appellant's claim that the bond does not cover insurance premiums collected by Watson which he has failed to pay over.

3. But, in our opinion, the court, on the trial, erred in striking out of the answer two defenses contained therein.

One of these defenses alleged that, at the date of the bond, on May 8, 1897, and for many years prior thereto, Watson was the local agent at St. Paul of the Pacific Fire Insurance Company, a corporation; that his duties as agent for that company were the same or similar to those required of him as the agent of plaintiff; that, as agent for the Pacific Company, large sums of the money of that company were received by him during said

time, and that he wrongfully converted all of said money to his own use, without the consent of the Pacific Company, and with intent to deprive it of the same; that, at the date of said bond, "plaintiff had full notice and knowledge of all of the foregoing facts and circumstances, and that this defendant Haag was at all times ignorant thereof," and that if he had known of said facts he would not have executed the bond. It is immaterial whether the dishonesty of Watson was disclosed while he was acting as the agent of plaintiff or the agent of some other insurance company. Plaintiff, by proposing to take Watson for its agent, impliedly represented that, as far as it knew, he was honest, and that it believed him to be so. If, at this time, it knew that he was dishonest, and a defaulter, it perpetrated a fraud on the defendant sureties in failing to disclose to them its ³⁹⁰ knowledge that he was dishonest and a defaulter: See *Traders' Ins. Co. v. Herber*, 67 Minn. 106; *Lancashire Ins. Co. v. Callahan*, 68 Minn. 277, 64 Am. St. Rep. 475; *Manchester Fire Assur. Co. v. Redfield*, 69 Minn. 10.

4. The other defense so stricken out alleges that, by the terms of the contract whereby Watson was so employed as the agent of plaintiff, the agency could be terminated at any time by either party by giving the other party written notice of such termination; that during the month of May, 1897, and after the date of said contract, and again during the month of June of that year, Watson, as the agent of plaintiff, collected premiums, and wrongfully and fraudulently converted the same to his own use, with intent to deprive the plaintiff thereof; "that this plaintiff did allow and permit said defendant Watson to so appropriate and convert said moneys during said months of May and June, 1897, and each of them, and that said moneys were so appropriated and converted with its connivance and consent, and this plaintiff did wholly fail and neglect to annul said commission and certificate, and did wrongfully and unlawfully hold out to the public and continue in its said agency said defendant Watson, down to August 28, 1897, without the consent or approval of this defendant, and without knowledge by this defendant of such conversion and appropriation."

Under the rule laid down in *Lancashire Ins. Co. v. Callahan*, 68 Minn. 277, 64 Am. St. Rep. 475, and *Manchester Fire Assur. Co. v. Redfield*, 69 Minn. 10, these allegations state a defense pro tanto. We find no other error in the record.

For error in striking out said portions of the answer, the order appealed from is reversed, and a new trial granted.

SURETYSHIP—KNOWLEDGE OF PRINCIPAL'S DISHONESTY—DISCHARGE OF SURETY.—In case of a continuing suretyship for the honesty of a servant, if the master discovers that the servant has been guilty of dishonesty in the service, and if, instead of dismissing him, he continues him in his employ without the consent of the surety, express or implied, the latter is not liable for any loss arising from the dishonesty of the servant during the subsequent service. This rule applies as well to a private corporation, as an employer, as to an individual, when its agent, in the discharge of his duties, discovers the dishonesty of the servant, and having authority, fails to give notice of such dishonesty to the surety, and the corporation thereafter retains the servant in its employ: Note to *Wilkerson v. Crescent Ins. Co.*, 62 Am. St. Rep. 154, but the contrary is held in the case itself. A defalcation, misappropriation, or failure to account for a previous indebtedness, existing at the time of the execution of the contract of suretyship or guaranty, is matter that will release the surety or guarantor if unknown to him: Note to *Fassnacht v. Emsing Gagen Co.*, 63 Am. St. Rep. 335.

STATE v. FREY.

[76 Minnesota, 526.]

WITNESSES—WIFE AGAINST HUSBAND—CRIME BY HIM AGAINST HER BEFORE MARRIAGE.—Under a statute which prohibits the examination of one spouse as a witness against the other without his or her consent, but which prohibition does not apply to a criminal proceeding for a crime committed by one against the other, a wife is not a competent witness against her husband in a prosecution against him for a crime committed against her before they were married.

DEFINITIONS.—THE TERM "FEMALE CHILD," as used in the Minnesota statute providing for the punishment of carnal knowledge of children, must be limited to children who have not reached the age of puberty.

W. B. Douglas, attorney general, and C. W. Somerby, assistant attorney general, for the state.

Mark L. Dougherty, for the defendant.

527 START, C. J. The defendant was indicted and placed upon trial on the charge of carnally knowing a female child under the age of sixteen years. The state called the prosecutrix as a witness against the defendant, and proposed to prove the commission of the crime by her. Thereupon the defendant objected to her proposed testimony, on the ground that she was his wife, and in support of his objection duly offered to prove by competent evidence that since the commission of the alleged offense he and the prosecutrix were duly and in all respects

lawfully married. The trial court ruled that for the purposes of the trial the marriage of the parties would be assumed, that the offer be taken as proved, and that the prosecutrix was a competent witness against the defendant, even if she were then his wife. The defendant's objection was accordingly overruled, and the witness gave testimony tending to establish the defendant's guilt. She was, at the time the act was committed, between fourteen and fifteen years of age, but more than fifteen years old at the time of the marriage. The defendant was found guilty. The court denied his motion for a new trial, and, at his request, with the consent of the state, certified ~~was~~ to this court the question of the competency of the prosecutrix as such witness, with other questions.

An answer to the question involves a construction of the General Statutes of 1894, section 5662, which, so far as here material, is this: "A husband cannot be examined for or against his wife without her consent, nor a wife for or against her husband without his consent; . . . but this exception does not apply to . . . a criminal action or proceeding for a crime committed by one against the other."

The proposition that a guilty man may defeat the ends of justice by marrying, after the act, the principal witness for the state, seems at first blush to be contrary to the dictates of common sense and common justice; but, when the origin and purpose of the statute are considered, it will be found that the statute rests upon considerations of sound public policy, which were recognized and enforced at common law, and, further, that the statute does not admit of any reasonable construction which does not render the wife incompetent as a witness against her husband when charged with an offense against her before the marriage. The common-law rule was that husband or wife could not testify for or against each other in any legal proceeding to which the other was a party. The rule rests on principles of public policy, which require that confidence between husband and wife should be conserved to the fullest extent, and it is enforced without reference to when the marriage relation began. This general rule of the common law was subject to the exception that, in all cases of personal injuries committed by the husband or wife against the other, the injured party was a competent witness against the other. The exception was allowed from necessity, for the protection of the parties, especially the wife, in the marriage relation, and partly for the sake of public justice: 1 Greenleaf on Evidence, secs.

334, 336, 343; Wharton on Evidence, sec. 393. Our statute, as to the exception here in question, does not introduce a new rule, or extend an old one. It simply enacts the common law: *State v. Armstrong*, 4 Minn. 251 (335).

Read in the light of its origin and purpose, the meaning of the statute is clear. It prohibits, on grounds of public policy, in general terms, the examination of one spouse as a witness against the ⁵²⁹ other without his or her consent; but, for the protection of the one against the criminal acts of the other, the statute further provides that the prohibition shall not apply to a criminal action or proceeding for a crime committed by one spouse against the other. The statute deals with the parties in the marriage relation, and not as to acts committed before the marriage. It is competent for the legislature to do so, but it has not seen fit to extend the exception to the prohibition to acts committed by one spouse against the other before the marriage.

It is, however, suggested on the part of the state that the defendant's crime was one against his wife. How could it be? He had no wife when the act was committed. The case of *State v. Evans*, 138 Mo. 116, 60 Am. St. Rep. 549, was in its facts similar to the one at bar, and involved the construction of a like statute. In that case the defendant was indicted for rape on a girl under the age of fourteen years—the age of consent—and after the act he married the prosecutrix; but, over his objection as to her competency, she was examined as a witness against him on his trial. The supreme court of Missouri held that the exception to the statute only admitted a wife to testify concerning injuries to herself as a wife, and not to a woman who at the time of the injury was not the wife of the defendant. In *People v. Schoonmaker*, 117 Mich. 190, 72 Am. St. Rep. 560, it was held that a statutory exception to the general rule of exclusion of the wife as a witness against her husband, substantially like the one we are considering, could not be extended, so as to make the wife a competent witness for the state on the trial of her husband for a crime alleged to have been committed against her before their marriage. The case of *Miller v. State*, 37 Tex. Cr. Rep. 575, holds, construing a similar exception to the general rule, that the wife is not a competent witness against her husband on his trial for an abortion upon her before their marriage. All of the cases cited by the state in support of its contention are cases, save one, where the offense charged against the husband was committed against the

wife during the marriage relation. The exception is the case of *Commonwealth v. Kreuger*, 17 Pa. Co. Ct. 181. We know of no case in a court of last resort which supports the contention of the state.

530 Our conclusion is that, under the provisions of the General Statutes of 1894, section 5662, a wife is not a competent witness against her husband in a prosecution against him for a crime committed against her before they were married. Whether the claims of public justice in such a case are superior to the considerations of public policy upon which the prohibition rests is a debatable question, the solution of which belongs exclusively to the legislature. We cannot amend the statute by judicial construction, even to prevent what seems to be a flagrant miscarriage of justice.

It is urged by the attorney general that the evidence shows that there was in fact no marriage between the parties in this case; that the form of a marriage ceremony was had, without any intention on the part of either party of assuming in fact the marriage relation; and, further, that the formal marriage was a fraudulent scheme on the part of the defendant to thwart the administration of justice. The difficulty with this claim is that no such issue was presented to or passed on by the trial court or jury, and no such question has been certified to this court for its decision. The trial of the defendant proceeded throughout on the assumption that a valid marriage of the witness and the defendant had been proved. It follows that, for the error in admitting his wife's testimony, the defendant is entitled to a new trial.

It is proper, with reference to such trial, to pass upon the defendant's claim that the term "female child," as used in the statute providing for the punishment of the carnal knowledge of children (Gen. Stats. 1894, sec. 6524), must be limited to those who have not reached the age of puberty. This statute was intended simply to raise the age of consent, and whoever carnally knows or abuses a child or girl under the age of sixteen years, whether large or small, with or without her consent, is guilty of a felony, and punishable as provided by the statute.

Order reversed, and a new trial granted.

WITNESSES—WIFE AGAINST HUSBAND—CRIME BY HIM AGAINST HER BEFORE MARRIAGE.—A wife is not a competent witness against her husband in a prosecution for rape committed on her prior to their marriage: *People v. Schoonmaker*, 117 Mich. 190, 72 Am. St. Rep. 560, and note.

SCHEIBEL v. ANDERSON.

[77 Minnesota, 54.]

MORTGAGES—REDEMPTION BY GRANTEE.—The holder of an equitable mortgage in form of an absolute deed may redeem from a mortgage foreclosure of the land, as a creditor, without any previous adjudication that his interest in the premises is that of a mortgagee.

J. A. Eckstein and Lind & Somsen, for the appellant.

C. A. Hagberg, and Somerville & Olsen, for the respondent.

⁵⁴ **MITCHELL, J.** Action to compel the defendant, Anderson, as sheriff, to execute to the plaintiff a certificate of redemption from a mortgage foreclosure sale.

The undisputed facts are as follows: One Fortwengler, being the owner of the land in question, executed three successive mortgages upon it—the first one to Aufderheide, in the form of an absolute deed to Aufderheide, accompanied by a contract by the latter to convey the land back to Fortwengler upon the payment of a specified ⁵⁵ sum; the second to one Williamson, in ordinary form; and the third to the plaintiff, in the form of an assignment to him of Aufderheide's contract to reconvey. This assignment was absolute in form, but was intended merely as security for the payment of certain indebtedness of the assignor to the assignee. One Schmidt, being assignee of the Williamson mortgage, foreclosed it under a power, and bid in the property at the sale on November 27, 1896. On November 27, 1897, the plaintiff filed notice of his intention to redeem as a creditor having a lien under his equitable mortgage, to wit, the assignment from Fortwengler of Aufderheide's contract to convey. On November 24, 1897, in an action brought by some of Fortwengler's judgment creditors against him, Aufderheide, and plaintiff, judgment was rendered adjudging Fortwengler's assignment of Aufderheide's contract to reconvey to be merely a mortgage. The judgment-roll was made up on that day, with a copy of the judgment attached, but the judgment was not in fact entered on the judgment-book until December 3d. On December 1, 1897, the plaintiff presented to defendant sheriff the required proofs of his right to redeem (including a copy of the judgment referred to), and tendered him the requisite amount of money, and demanded a certificate of redemption from the sale on the Williamson mortgage. The sheriff refused to receive the money or to execute a certificate of redemption.

There is nothing in the point that plaintiff's proofs should have included a copy of the deed from Fortwengler to Aufderheide. That deed constituted a part of the mortgage from Fortwengler to Aufderheide, but not of the mortgage from Fortwengler to the plaintiff.

Two objections are made to plaintiff's right to redeem: 1. That, although he was in fact an equitable mortgagee, yet upon the face of the records, and upon the face of the assignment to him of the Aufderheide contract to convey, he appeared to be an owner of the premises, and not a creditor having a lien, and therefore he should have redeemed as owner within one year from the date of the sale; 2. That, at the time of an attempted redemption, there was no judgment adjudging the assignment to him of the Aufderheide contract to be a mortgage; and in reference to this ^{see} last point we are asked to overrule *Clark v. Butts*, 73 Minn. 361.

We see no reason for overruling that case. On the contrary, subsequent observation and information has increased our conviction that that decision was not only sound in principle, but also founded on considerations of wise public policy, in shutting off an incipient, but extensive, branch of legal industry, which would otherwise have upset almost innumerable titles, where the property had gone into the hands of innocent purchasers relying upon judgments regular and valid on their face. But that question is not in this case. The plaintiff was claiming the right to redeem, not under the judgment, but under his equitable mortgage or lien on the land, by virtue of the assignment to him of the Aufderheide contract to convey. The only relation, if any, which the judgment had to the matter, was as proof that this assignment was in fact a mortgage.

Hence the only question left is whether, in view of the fact that this assignment was absolute in form, although a mortgage in fact, plaintiff had a right to redeem as a creditor without first obtaining a judicial determination that he was merely a mortgagee—a question mooted, but not decided, in *Maurin v. Carnes*, 71 Minn. 308. A fuller consideration of the subject has satisfied us that there is nothing in the point.

The statute relating to redemptions expressly gives the right to creditors having an equitable lien, as well as to those having a legal lien, on the premises. There is nothing in the statute requiring creditors having equitable liens to obtain any such adjudication as a prerequisite to the right to redeem, and, with-

out elaborating on the subject, the provisions of the statute relating to the proofs to be furnished of the right to redeem clearly imply that no such adjudication was intended or contemplated. Moreover, such an adjudication would be of little or no value, unless it was one which would be binding on all persons who might be in position to question the party's right to redeem. This could never be obtained with any certainty, for new parties of this character are liable to come into being up to the very last day of the year after the date of sale; and, of course, a judgment only binds the parties to the action and their privies. Our conclusion is that the plaintiff had a right to redeem ⁵⁷ as a creditor without any previous adjudication that his interest in the premises was that of a mortgagee. This being so, his offer to redeem was in time.

Order and judgment affirmed.

MORTGAGE FORECLOSURE—WHO MAY REDEEM FROM.—A grantor by an absolute deed, intended as a mortgage, has the same right to redeem from a mortgage foreclosure as a mortgagor in a formal mortgage would have, so long as the grantee retains the property: See the monographic note to *Horn v. Indianapolis Nat. Bank*, 21 Am. St. Rep. 247, on who may redeem from a foreclosure sale.

HULL v. CHAPEL.

[77 Minnesota, 159.]

OFFICERS — BONDS — RELEASE OF SURETIES.—If a sheriff receives money, in his official capacity, belonging to a certain person, and duly tenders payment thereof to the latter's agent, who has full authority to demand, receive, and receipt therefor, but who, without just or lawful cause, refuses to accept or receive it, the sureties on the sheriff's official bond are thereby released from liability for the money, although the principal of such agent subsequently demands payment of such money from the sheriff and is refused.

SURETYSHIP—RELEASE OF SURETY.—If the principal, after the debt is due, duly tenders payment, and the creditor refuses to receive it, the surety is discharged.

J. E. Stryker, for the appellant.

J. F. Fitzpatrick and W. L. Chapin, for the respondents.

¹⁰² **MITCHELL, J.** The defendant Chapel having been elected sheriff of Ramsey county, he, as principal, and the other

defendants, as sureties, executed an official bond, conditioned that Chapel should well and faithfully in all things perform and execute the duties of sheriff according to law during his continuance in office. This is an action on the bond to recover the sum of fifteen hundred and forty-eight dollars and fifty cents belonging to the plaintiff, which was received by Chapel as sheriff upon the redemption from a mortgage sale at which the plaintiff was purchaser, and which it is alleged Chapel has failed and refused to pay over to the plaintiff, although repeatedly requested so to do. There are two appeals—one from a judgment dismissing the action as to the defendant Merriam, and the other from an order opening the default of the defendants Warner and Kittelson to answer.

1. The facts material to the appeal from the judgment are as follows: Promptly after Chapel received the money, and in December, 1895, he duly and unconditionally tendered payment of the same to plaintiff's agent, who had full authority to demand, receive, and receipt for the same in his behalf, but such agent, without any just or lawful reason, then and there refused to accept or receive the money. Subsequently, on three different occasions, viz., July, 1896, December, 1896, and June, 1897, the plaintiff duly demanded payment of the money from Chapel, which on each of these occasions ¹⁶³ he refused to make. The sole question is whether, upon these facts, the sureties were released.

The rule is well settled that if the principal, after the debt is due, duly tenders payment, and the creditor refuses to receive it, the surety is discharged. One of the reasons sometimes assigned for this rule is that the transaction amounts to a payment of the debt, and a new loan to the principal. But doubtless the main reason for the rule is that the contract of suretyship imports entire good faith and confidence between the parties in regard to the whole transaction, and any bad faith on part of the creditor will discharge the surety. The refusal of the creditor to receive the money is a fraud on the surety, which exposes him to greater risk. After the debt is due and payable, the creditor cannot, by his unjustifiable refusal to accept payment from the principal, compel the surety to continue responsible for the future acts of the principal as his debtor or bailee of his money. If it were otherwise, the creditor would have it in his power to keep the surety liable indefinitely. At least as to private debts and unofficial bonds, it cannot be necessary to cite authorities on the proposition. In such case it is

not necessary, in order to release the surety, that the principal should keep the tender good. It is the refusal of the tender which works the release. Neither is it material that the tender was made to and refused by the duly authorized agent of the creditor, instead of the creditor in person. Having made the agent his alter ego, *pro hac vice* the creditor is bound and affected by the agent's acts in that regard the same as if they were his own personal acts. Neither does the mere fact that the liability of the surety is upon a bond constituting a continuing guaranty of the fidelity of the principal alter the rule, although, of course, in such a case, conduct on part of the creditor which will release the surety from one breach of the bond by the principal will not release him from liability for subsequent and independent breaches. Therefore, if the sureties in this case are not released as to the claim of the plaintiff, it must be because of some distinction or difference between the liability of sureties for a private debt or on an unofficial bond and their liability on an official bond.

A sheriff's bond has a dual character, or, more properly speaking, ¹⁶⁴ it is designed to secure the performance of two classes of official duties, viz., those due the public as such and those due private persons for whom he is called on to perform official work. While the bond runs to the state as the nominal obligee, yet the real obligees or beneficiaries are not only the state or county, but also any person for whom the sheriff is called upon to perform an official duty. If this action was brought by the state or county to recover on the bond for a breach of it with reference to some duty which the sheriff owed the public in its organized capacity, and the refusal of the tender had been by some other public officer, a very different principle would be involved. But the breach here complained of was of a duty owing to a private individual, and one in which no one but he had any interest. As respects such a liability, we fail to see why the same acts on the part of the creditor which would release a surety on a private bond should not also release a surety on a sheriff's official bond.

The contention of the plaintiff is, in substance, that the bond was a continuing guaranty of the official conduct of the sheriff; that the refusal of the sheriff on demand, subsequent to the tender, to pay over the money, was a new breach of the conditions of the bond, for which the sureties are liable. But it seems to us that this overlooks the fact that the duty which the plaintiff demanded the sheriff to perform was the same one of

which the sheriff had previously tendered performance, and which the plaintiff had, in violation of the rights of the sureties, refused to accept; and that, if he had accepted it, as he ought, the debt would have been paid, and no subsequent default of the sheriff as to that debt could ever have occurred. The violation of the rights of the sureties consisted of the refusal of the tender, and, if that released them, it is impossible to see how a subsequent change of mind and demand on part of the plaintiff could revive their liability as to that debt, or undo the harm done by the prior refusal of the tender.

The only case cited by plaintiff's counsel which tends to support his contention is *State v. Alden*, 12 Ohio, 59, in which it was held that, where a sheriff absconds with money in his possession, collected on execution, having previously made a tender to the party entitled, who refused to receive it, such tender and refusal is no defense ¹⁶⁵ to the sheriff's sureties in a suit upon his official bond. The opinion in that case is very brief, and no authorities are cited. The line of reasoning adopted was as follows: "The principle of discharge, arising from an act done by the creditor, prejudicial to the surety, does not apply. An ordinary suretyship is a mere contingent obligation, for the payment of money, in default of the principal. The sureties upon an official bond guarantee the faithful performance of official duty. The payment of money, and other acts done by the creditor, injurious to the surety, may discharge the one, but the faithful and honest performance of official duty alone can fulfill the condition of the other. The fact of tender and refusal does not convert the official trust into a mere private liability for a money demand. The obligation to pay over money received by a sheriff in his official capacity continues an official duty until performed by payment to the party entitled. As long, then, as the obligation to pay continues an official duty, so long were the sureties responsible for its violation, upon their bond."

We confess our inability to understand this line of reasoning, unless it means that no acts or conduct on part of a creditor or other private party interested in the official conduct of a sheriff will release the sureties on his bond until and unless the sheriff has fully performed his whole duty in that regard by paying the money to the party entitled to it—a proposition which we think will be found to be without support in any other adjudicated case.

2. The defendants Warner and Kittelson having failed to answer within the time allowed by law, judgment was entered against them on default October 7, 1898. Subsequently, on their motion, the court made an order opening the judgment, and allowing them to answer. The only question on the appeal from this order is whether, in making it, the court abused its discretion.

The motion was heard on affidavits and counter-affidavits, which reasonably tended to show the following state of facts: Within two or three days after the service of the summons upon them in May, 1898, these two defendants had an interview with their principal, Chapel, in regard to the action, in which he, in substance, told them that they need not give it any attention, and promised them that he would attend to it for them, and have his attorney interpose an answer for them, and that, relying on this promise, ¹⁰⁸ they omitted to serve any answer in their own behalf, and that they never knew that any judgment had been entered against them until in December, 1898. Their affidavits to the above effect were accompanied by their proposed answer, and were corroborated by that of Chapel, who also swore that he did instruct his attorney to serve an answer in the action for Warner and Kittelson similar to the one served for himself and Merriam. This attorney, having enlisted in the military service of the United States, retired from the case in the late spring or early summer of 1898, whereupon Chapel and Merriam employed their present counsel. It appears from the counter-affidavits interposed in behalf of the plaintiff that Chapel had notice that no answer had been served in behalf of Warner and Kittelson at the time of the trial of the issues between the plaintiff and himself and Merriam on the last day of June or the first day of July. Very shortly after learning that judgment had been entered against them, and some time early in December, Warner and Kittelson employed counsel to apply to have the judgment opened, and to obtain leave to answer. The preparation of the motion papers was somewhat delayed by sickness of counsel and the absence of Chapel from the city, but notice of a motion to be heard January 7, 1899, was served during the last days of December, 1898.

We cannot see that these defendants were guilty of any personal negligence, unless it was in trusting to their principal to attend to the matter for them. But this is the most natural

thing in the world for sureties to do, as their principal owes them at least the moral duty to do so, and is ordinarily the only one conversant with the facts. Chapel was doubtless guilty of negligence and great disregard for the interests of his own sureties in failing to take steps to relieve them from the default after he ascertained at the trial of the action that his original attorney had failed to interpose an answer in their behalf; but this does not militate so strongly against the defendants as if it had been their own personal negligence. It appears from the whole case, as well as from their answer, that they have a good defense which is meritorious, and not merely technical, as suggested by plaintiff's counsel. It was a somewhat broad stretch of judicial discretion to relieve them from ¹⁰⁷ their default, but, under all the circumstances, we do not think we would be warranted in holding that it amounted to an abuse of discretion.

Judgment and order affirmed.

SURETY, RELEASE OF.—As to what will release or discharge a surety, see the monographic notes to *Scott v. Fisher*, 28 Am. St. Rep. 691, 692; *First Nat. Bank v. Gerke*, 6 Am. St. Rep. 458-460. A surety tendering payment of a debt is released if the creditor refuses to accept: *O'Connor v. Morse*, 112 Cal. 31, 53 Am. St. Rep. 155.

PETERSON v. VANDERBURGH.

[77 Minnesota, 218.]

EQUITY—JURISDICTION IN PROBATE.—An executor may maintain a bill in equity against his coexecutor for the purpose of having the amount determined and to enforce a claim held by the estate against such coexecutor, arising on a contract entered into with the testator in his lifetime, and due at the time of his decease, when the coexecutor disputes the amount and refuses to pay.

EQUITY—JURISDICTION IN PROBATE.—Equity may entertain an action brought by one executor against his coexecutor on the part of the estate to determine the amount of a disputed claim, or to force an account, or to foreclose a mortgage, or in any other case where justice requires it and there is no remedy at law.

H. V. Mercer, for the appellant.

How & Butler, for the respondent.

²²⁰ COLLINS, J. Plaintiff brought a bill in equity, and defendant demurred upon ²²¹ the ground that the district

court had no jurisdiction of the subject of the action. Plaintiff appeals from an order sustaining the demurrer.

The question to be determined is, Has an executor in this state the right to bring a bill in equity in the district court against a coexecutor for the purpose of having the amount determined, and to enforce a claim held by the estate against such coexecutor, arising on contract entered into with the testator in his lifetime, and due at the time of his decease, when the coexecutor disputes the amount and refuses to pay until such amount is ascertained? Plaintiff's counsel admits that at common law such an action cannot be maintained, but he insists that in equity the rule is to the contrary, and that one executor or administrator may bring a bill against a coexecutor, when justice requires it, to ascertain the amount and to enforce a claim of this character. The position of defendant's counsel is that, where a testator appoints a debtor his executor, the debt becomes, immediately upon his qualification as executor, an asset in his hands, applicable to the purposes of the will, and for which he can only be compelled to account in the probate court, precisely as he must account for other assets, and that, where the amount of the debt is in dispute, the probate court has full power to hear and determine the amount of such indebtedness, as between the estate and the executor.

The jurisdiction of the probate court in this state is fixed by the fundamental law: Const., art. 6, sec. 7. Its jurisdiction is expressly limited and restricted to the estates of deceased persons and persons under guardianship. If, under this provision, the probate court has exclusive jurisdiction over the subject of this action, the order of the court below was right, and should be affirmed. But if exclusive jurisdiction has not been conferred on the probate court, and if the district court has not been deprived of jurisdiction, the action may be maintained, and the trial court erred when sustaining the demurrer. Even if it be admitted that the probate court can have jurisdiction by holding the debt to have become an asset in defendant's hands immediately upon his qualification as an executor, and by enforcing its collection in the settlement of his trust account, it would not follow that, where justice required it, and ²²³ there was no remedy at law, an equitable action could not be maintained in the district court for the purpose of ascertaining the amount of a disputed claim and for such other purpose as equity might require. Such a case would simply be one of concurrent jurisdiction, and not at all novel.

But, in any event, it seems to be well settled that a court of equity will entertain an action brought by one executor on the part of the estate against a coexecutor to determine the amount of a disputed claim, or to force an account, or to foreclose a mortgage, or in any other case where justice requires it, there being no remedy at law: Schouler on Executors, sec. 403; 3 Williams on Executors, Perkins' notes, 2024; 1 Pomeroy's Equity Jurisprudence, sec. 51; 3 Redfield on Wills, 203, 235; 8 Ency. of Pl. & Pr. 699; and the many cases cited in these books. See, also, Rogers v. Rogers, 75 Hun, 133; 27 N. Y. Supp. 276.

This rule is in the right direction beyond question, and covers the complaint now before us. Nor does this rule infringe upon that laid down in the cases cited by defendant's counsel, seemingly, to the effect that it is the equitable doctrine that, where a debtor is appointed executor of the will of his creditor and accepts the trust, the debt is presumed to have been paid, is to be treated as an asset in the executor's hands, and stands upon the same footing as other assets, to be accounted for in settlement of the estate, and in no other manner. The question now before us did not appear in any of those cases, and nowhere is it intimated that a bill in equity will not lie in favor of one executor or administrator, and against a coexecutor or administrator, when the latter disputes the amount of an alleged indebtedness and refuses to pay, if justice requires the bringing of such an action, and there is no adequate remedy at law.

Order reversed.

CANTY, J. I concur. Our constitution gives the probate court exclusive jurisdiction of certain matters, which implies that it has no jurisdiction of other matters. Then it is not often that the probate court and the district court have concurrent jurisdiction. But, as regards such question of concurrent jurisdiction, an indebtedness due from a coexecutor to the estate, and incurred during the life of the testator, stands on the same footing as an indebtedness ²²³ due from a third party to the estate, incurred during the life of the testator. The district court has jurisdiction of an action brought by the executor against such third party in such a case. But, if the third party should file a claim against the estate in the probate court, the executor could plead in that court, as an offset or counterclaim, the indebtedness due from the third party

to the estate. In this manner, the two courts have concurrent jurisdiction. As affecting this question of concurrent jurisdiction, it is immaterial that the indebtedness is due to the estate from a coexecutor, instead of from a third party. The district court still has jurisdiction, and the action may be brought in equity in that court by the other coexecutor. Of course, the existence of other facts may or will, before the estate is settled, draw the claim into the probate court, and give that court jurisdiction, just as the existence of other facts would draw to that court such a claim against a third party, and give that court jurisdiction over that claim. In my opinion, these are the principles on which the district court and the probate court have concurrent jurisdiction in such a case as this.

EQUITY—PROBATE JURISDICTION.—Though the settlement of estates of decedents is committed to probate courts by statute, equity has jurisdiction whenever its aid is required and the powers of the probate courts are not sufficient to deal with the question at issue: *Bailey v. Bailey*, 67 Vt. 494, 48 Am. St. Rep. 826; monographic note to *Deck v. Gerke*, 73 Am. Dec. 558-560. See, also, *Simons v. Bedell*, 122 Cal. 341, 68 Am. St. Rep. 35, and note.

ONE EXECUTOR CANNOT SUE HIS COEXECUTOR for property or money in his hands belonging to the estate: *Inaley v. Shire*, 54 Kan. 798, 45 Am. St. Rep. 308.

HOERR v. MEIHOFFER.

[77 Minnesota, 228.]

EXECUTIONS—ISSUE PRIOR TO DOCKETING JUDGMENT.—Execution issued before a judgment rendered and docketed in one county is docketed in another county, and reciting the docketing of the judgment in the latter county two days after such execution was issued, and two days after its date, is irregular, but not void; and such irregularity is cured by the subsequent docketing of the judgment in such other county at the time mentioned.

JUDGMENTS—EVIDENCE OF ANTECEDENT DEBT.—A judgment is not, at least as against strangers to it, evidence of the antecedent existence of the debt for which it was rendered.

H. H. Dunn, for the appellant.

Pfau & Pfau, for the respondent.

229 CANTY, J. On February 10, 1881, John Meißhofer was the owner of an undivided one-half of a certain eighty acres

of land in Martin county, in this state. On that day he and his wife conveyed the land to his brother, Martin Meihofner, and the deed was recorded March 2, 1881. On the same day Nichols & Dean brought an action against John in Blue Earth county, where he then resided, and a writ of attachment was issued out of the district court of that county in that action, directed to the sheriff of Martin county, and was levied on the land as the property of John on March 3, 1881. On March 23, 1881, Nichols & Dean obtained judgment against John in that action for two hundred and ninety-three dollars and thirty-four cents, which judgment was docketed in Blue Earth county on that day, and in Martin county on March 25, 1881. On the day the judgment was entered execution was issued thereon directed to the sheriff of Martin county, dated that day, and reciting that the judgment was docketed in Martin county on March 25, 1881. This execution was levied on the land, which was sold thereunder on execution sale, and bid in by Nichols & Dean, on May 7, 1881. They sold the sheriff's certificate of the execution sale and all their interest in the land to this plaintiff February 29, 1882. Thereafter the time to redeem expired, and no redemption was made. On June 23, 1882, ²³⁰ Martin conveyed the premises to defendant, the said wife of his brother, John. This action was brought to determine the adverse claim of defendant. On the trial the court found for plaintiff, and from the judgment entered accordingly defendant appeals.

1. Appellant contends that the execution was and is void because it was issued before the judgment was docketed in Martin county, and because it recites the docketing of the judgment in that county two days after such execution was issued, and two days after its date. While, for these reasons, the execution was irregular, it was not void, but the irregularity was cured by the subsequent filing of the transcript and docketing of the judgment in Martin county two days after the execution issued, and the execution sale passed whatever title John Meihofner had at the time the judgment was so docketed: See *Gowan v. Fountain*, 50 Minn. 264, 266; *Chase v. Ostrom*, 50 Wis. 640; *Rogers v. Cherrier*, 75 Wis. 54, and cases cited.

2. Respondent claims that the deed from John and wife to his brother, Martin, and the deed from Martin back to John's wife, this appellant, were executed without consideration, and were made and received with intent to defraud the

creditors of John; and the court so found. But appellant contends that there is no evidence that John was ever, prior to the entry of the judgment against him, indebted to Nichols & Dean, and that, therefore, plaintiff is not in position to impeach the conveyance from John to his wife through Martin. In our opinion, the point is well taken. The only evidence given on the trial of any such indebtedness was the evidence of defendant that her husband said he owed Nichols & Dean, in St. Paul, and the evidence of Martin that about the time the deed was made to him his brother, John, told him that he (John) owed Nichols & Dean, in St. Paul, but that he did not state how much he owed them. Even if it were held that this was competent as evidence to prove an indebtedness from John to Nichols & Dean, the amount of that indebtedness nowhere appears, and it does not appear that it was the same indebtedness for which the judgment was entered by Nichols & Dean against John: See *Bloom v. Moy*, 43 Minn. 397, 19 Am. St. Rep. 243. This court has often held that a judgment does not, at least as against strangers to it, prove the antecedent existence of ²³¹ the debt for which it was rendered: *Hartman v. Weiland*, 36 Minn. 223; *Bloom v. Moy*, 43 Minn. 397, 19 Am. St. Rep. 243, and cases cited.

Judgment reversed and a new trial granted.

AN EXECUTION PREMATURELY ISSUED is not on that account void: *Freeman on Executions*, 3d ed., sec. 25; *De Loach v. Robbins*, 102 Ala. 288, 48 Am. St. Rep. 46; it is merely irregular and voidable: *Waldrop v. Friedman*, 90 Ala. 157, 24 Am. St. Rep. 775. Where a valid judgment exists, an execution may properly issue thereon, though the judgment has not actually been entered of record: Note to *Waldrop v. Friedman*, 24 Am. St. Rep. 778.

JUDGMENT AS EVIDENCE OF DEBT.—A judgment is conclusive evidence of the existence of a debt at the time of its rendition, but it is not evidence against strangers or innocent purchasers that such debt existed at any time anterior to the rendition of such judgment: *Simmons v. Shelton*, 112 Ala. 284, 57 Am. St. Rep. 89.

LIDGERDING v. ZIGNEGO.

[77 Minnesota, 421.]

PRIVATE WAYS — EASEMENT APPURTENANT TO LAND.—A bargain and sale deed containing no words of inheritance, executed by the owner of land, of a right of way across his farm, "to cross on foot or with team upon or near" a certain government line, is sufficiently definite as to the land to be used as a right of way, and creates an easement in the land of the grantor appurtenant to the land of the grantee, which the latter may transfer by grant of his land.

EASEMENTS — APPURTENANT OR IN GROSS — PRESUMPTION — RIGHT OF WAY.—An easement, such as a right of way, may be created by grant in gross, but this is never presumed when it can be fairly construed to be appurtenant to some other estate. An easement is appurtenant, and not in gross, when it appears that it was granted for the benefit of the grantee's land. A right of way is appurtenant to the land of the grantee, if so in fact, although not declared to be so in the deed. If the way leads to the grantee's land, and is useless except for use in connection with it, and is so used, it is appurtenant to it.

EASEMENT — WHETHER APPURTENANT OR IN GROSS — HOW ASCERTAINED.—Whether a grant of an easement is in gross or appurtenant to some other estate may be determined by the relation of the easement to such estate, or the absence of it, in the light of all the circumstances under which the grant was made.

J. C. McClure, for the appellant.

A. Johnson, for the respondent.

422 MITCHELL, J. This was an action to recover damages for an alleged trespass upon real property.

The material facts are as follows: In 1866 one Schlichthaber ⁴²³ owned and occupied a farm, and one Youngers owned and occupied another farm adjoining on the east. Near the east line of Schlichthaber's farm, but fifteen rods west of it, there ran through his land a north and south highway, known as the "Red Wing and Zumbrota road," to which Youngers had no access from his own farm. In this condition of things, in December, 1866, Schlichthaber executed to Youngers a deed of right of way across the land of the former, the terms and conditions of which were that, for the expressed consideration of one dollar, Schlichthaber "bargained, sold, released, and conveyed to Youngers the right of way to cross on foot or with team the land [of the former—describing it]; which right hereby conveyed shall be understood to be, and is hereby declared to be, the right to cross said land as aforesaid upon or near the line between the northwest quarter and the southwest

quarter of said northeast quarter of section 5, as near as practicable."

This instrument was duly recorded. Subsequently, by certain mesne conveyances, the plaintiff became the owner of the Schlichthaber farm, and the defendant became the owner of the Youngers farm; the deed from the latter to the defendant containing, in addition to a conveyance of the land, the following: "And the said grantors hereby grant, bargain, sell and convey unto the said grantee, his heirs and assigns, all and singular the rights, privileges, and easements conveyed to the said William Youngers by Frederick Schlichthaber and wife by written instrument [describing the instrument already referred to]."

The record seems to be somewhat elliptical, but from what the evidence discloses, and from what is asserted by the trial court and defendant's counsel, and not disputed by plaintiff's counsel, we assume that soon after the grant of right of way by Schlichthaber to Youngers, in 1866, a driveway just wide enough for a wagon to pass along it was established across the land of Schlichthaber, and upon or near the line referred to in the deed from Schlichthaber to Youngers, and extending from the line between the two farms west to the Red Wing and Zumbrota road, and that this driveway has been used by Youngers, and the defendant, his grantee, up to 1898, as a means of ingress and egress to and from their farm to this highway. In 1898 the plaintiff ⁴²⁴ placed a fence and other obstructions across this driveway, in order to prevent the defendant from using it. The defendant removed the obstructions, and continued to use the driveway as before. This constitutes the alleged trespass complained of. The trial court directed a verdict for the defendant, and from an order denying plaintiff's motion for a new trial the latter appealed. The case, in our judgment, depends entirely upon the construction and effect to be given to the deed of right of way from Schlichthaber to Youngers.

1. It is urged that the provisions of this instrument are so indefinite and uncertain as to the land to be used as a right of way as to render it wholly void. We discover no such indefiniteness in the instrument. It states the purposes for which the right may be used, to wit, to cross the land on foot or with team, and this necessarily implies the right to use a strip of land of the width reasonably necessary to the enjoyment of the

uses for which the grant was made. It defines the line upon or near which the right of way shall be located. The driveway appears to be located on that line, and there is no claim that more land has been used than is necessary. The language of the instrument is perhaps broad enough to give the grantee a right of way entirely across plaintiff's farm, but the practical construction apparently given to it by both parties has been to limit this right to the distance necessary to give the grantee access from his land to the highway, which was doubtless the object of the grant.

2. It is further contended that the provisions of the instrument amounted merely to a revocable license personal to Youngers alone, and hence not assignable, and which was in fact revoked by Schlichthaber's alienation of the land. This contention is based upon the fact that the instrument does not contain the words "heirs and assigns."

It is very clear, under all the authorities, that the right of way granted constituted an "easement." We do not deem it necessary to discuss the question. We are also of opinion that it was not an easement in gross—that is, personal to Youngers—but an easement appurtenant to the land then owned and occupied by Youngers as a farm. Though an easement, such as a right of way, may ⁴²⁵ be created by a grant in gross, this is never to be presumed, when it can be fairly construed to be appurtenant to some other estate: Washburn on Easements, 45. An easement is appurtenant, and not in gross, when it appears that it was granted for the benefit of the grantee's land. A right of way is appurtenant to the land of the grantee if so in fact, although not declared to be so in the deed. If the way leads to the grantee's land, and is useless except for use in connection with it, and after the grant was used solely for access to such land, it is appurtenant to it: Jones on Easements, sec. 19. Whether a grant of an easement is in gross or appurtenant to some other estate may be determined by the relation of the easement to such estate, or the absence of it, and in the light of all the circumstances under which the grant was made: Jones on Easements, sec. 34; Hopper v. Barnes, 113 Cal. 636; Dennis v. Wilson, 107 Mass. 591.

We have here two adjacent land owners, Schlichthaber and Youngers. A highway runs across the land of Schlichthaber, to which Youngers has no access from his own land. The right of way granted by Schlichthaber to Youngers gives the latter access from his own land to this highway, and it is afterward

used for that purpose. This right of way is, so far as appears, absolutely useless for any other purpose. We therefore hold that the right of way granted was not in gross, but appurtenant to the land then owned and occupied by the grantee, Youngers. In view of the facts, this is so whether the grant to Youngers was in fee simple, or, in view of the absence of words of inheritance, only for life—a question not in this case: *Dennis v. Wilson*, 107 Mass. 591. The limitation of a right, in express terms, to the life of the grantee, may afford some ground of inference that it was intended to be personal or in gross; but that ground of inference would be overcome if the nature of the right and its apparent use were such as to indicate that it related wholly to the convenience or occupation of real estate. But, as said in *Dennis v. Wilson*, 107 Mass. 591, when the limitation results from omitting words of inheritance, the inference in that direction, if any can be drawn therefrom, must be very slight. Defendant, having a right of way over plaintiff's land, could lawfully use all peaceable means reasonably necessary to remove the obstructions, so as to enable him to exercise his right.

3. Plaintiff testified that ⁴²⁶ "when the defendant tore the fence down he broke the boards and entirely destroyed them. The materials used in building the fence, and the labor in putting it up, would be, at least, of the value of two dollars."

It is claimed by the plaintiff that he was entitled to a verdict for at least two dollars. This was, at best, a mere trifling side issue, and does not appear to have been urged or brought to the attention of the court on the motion to direct a verdict. It will be observed that there was no evidence of the value of the boards exclusive of the labor in constructing the fence, or that it was unnecessary to break and destroy the boards for the purpose of removing the fence. In view of the purpose for which the plaintiff built the fence, it is not improbable that the boards were so securely fastened that, in order to remove them, it was necessary to break them, so as to destroy their value as lumber.

Order affirmed.

A RIGHT OF WAY APPENDANT is incident to an estate one terminus of which is the land or tenement of the person claiming it. It inheres in the land, pertains to the enjoyment of the premises, and passes with them. It may be derived from an express grant, from a grant in which it is not expressed, from necessity, by implication, or by prescription: *Alley v. Carleton*, 29 Tex. 74, 94 Am. Dec. 260.

A RIGHT OF WAY IN GROSS is attached to the person to whom it is granted. It must be claimed by grant or by prescription by the claimant in his own person, and does not arise in this manner where it can fairly be construed to be appurtenant to another estate: *Alley v. Carleton*, 29 Tex. 74, 84 Am. Dec. 280.

WHETHER A GRANT OF A RIGHT OF WAY IS IN GROSS or appurtenant to some other estate must be determined from the grant itself, and not from matter allunde: *Wagner v. Hanna*, 38 Cal. 111, 89 Am. Dec. 354.

EASEMENT, TRANSFER OF.—An easement not expressly described in a conveyance must actually belong to the estate conveyed in order to pass by implication: *Bumstead v. Cook*, 169 Mass. 410, 61 Am. St. Rep. 293.

STATE v. WAGNER.

[77 Minnesota, 483.]

CONSTITUTIONAL LAW—REGULATION OF SALE OF FARM PRODUCTS ON COMMISSION.—A statute to license, regulate, and define the business of commission merchants, or persons selling agricultural products and farm produce on commission, to require them to give bond to the state for the benefit of their consignors, and to make reports to them, or, upon their failure so to do, authorizing a commission to make investigation, and prescribing a penalty for its violation, is a valid exercise of the police power, and not unconstitutional, either as abridging the privileges or immunities of citizens, nor as depriving them of their liberty or property without due process of law, nor as denying them the equal protection of the law, nor as depriving them of the right to be secure in their persons, houses, papers, and effects against unreasonable search and seizure, nor as compelling them to be witnesses against themselves in criminal cases, nor as an interference with interstate commerce, nor as an unlawful delegation of legislative power.

CONSTITUTIONAL LAW—SALE OF FARM PRODUCTS ON COMMISSION.—The peculiar characteristics of farm produce, and the liability to peculiar abuses resulting from a sale thereof on commission, are such as make a practical necessity for distinctive legislation on the subject different from what would be necessary in case of other property sold on commission, and justifies the legislature, in its discretion, in putting those who sell it on commission in a class by themselves, and this may be done as a valid exercise of the police power.

Palmer & Beck and Wilson & Van Derlip, for the relators.

W. B. Douglass, attorney general, and Childs, Edgerton & Wickwire, for the respondents.

401 **COLLINS, J.** Habeas corpus proceedings originally instituted in Ramsey county, and coming here on appeal; the purpose being to test the constitutionality of chapter 225 of

the Laws of 1899. The court below sustained the act, and remanded the prisoner, Redpath. The same questions were raised in another proceeding (*State v. Megaarden*), and the cases have been argued as one by eminent counsel, who have ably and exhaustively presented their views—orally as well as upon briefs.

The title of the act assailed as unconstitutional for a number of reasons is as follows: "An act to license and regulate and define business of commission ⁴⁹² merchants or persons selling agricultural products and farm produce on commission, and to require them to give a bond to the state of Minnesota for the benefit of their consignors, and prescribing a penalty for the violation of any of the provisions of this act."

It consists of eight sections, the first declaring it shall be unlawful from and after June 1, 1899, for any person, firm, or corporation to engage in the business of selling agricultural products and farm produce on commission in this state without first obtaining a license from the state railroad and warehouse commission. A bond with sufficient surety is required for the benefit of consignors, the amount of the penalty to be fixed by the commission; and, if the principal therein is to receive grain for sale, the condition of this bond is that he will faithfully account and report to all persons intrusting him with grain, and will pay over to them all proper proceeds. If grain is not received for sale on commission, the bond is to be conditioned for the faithful performance of the commission merchant's duty. By the second section the merchant who sells grain is required to render a certain statement to his consignor within twenty-four hours after a sale of all or a portion of such grain. The third section relates to products and produce other than grain. If a consignor shall not receive report of a sale or a remittance therefor after demand, or if, after a report is made, he is dissatisfied with it or the sale, he may complain to the railroad and warehouse commission, whose duty it is to investigate the case, and after such investigation to make a written report to the complainant; and this report is made *prima facie* evidence of the matters therein contained. In making this investigation power is conferred upon the commission, in express terms, to compel the merchant "to produce his record or memoranda of such sale, and give them all information in his possession regarding the report and sale so complained of."

Section 4 provides for the machinery of the act. A commission merchant desiring to procure a license must make application in writing to the railroad and warehouse commission,

the application to contain certain information in respect to the nature of the business to be done by the applicant, his proposed place of business, ⁴⁹³ and the probable amount of business to be done each month. It is then incumbent on the commission to fix the amount of the bond required, and upon the execution of such a bond with sufficient security, and the payment of a fee of one dollar, to issue a license for one year. An additional bond may be required whenever it shall be deemed necessary by the commission, the amount thereof to be determined by that body. And herein the railroad and warehouse commission is given authority to revoke licenses under certain conditions. Section 5 provides for an action upon the bond by the consignor in case a consignee fails or neglects to account and report a sale; or neglects to pay over the moneys due on account of a sale, recovery to be had against the principal and sureties of the bond, with a proviso as to a distribution of the amount received in case default has been made as to two or more consignors, and such amount is insufficient to discharge the entire liability. Section 6 defines a commission merchant within the meaning of the act, while section 7 declares that any person, persons, or corporation engaged in selling any of the property for which a license is required who fails or neglects to comply with any of the provisions of the act, shall be guilty of a misdemeanor, and on conviction shall be punished by a fine. Section 8 merely provides when the act shall take effect.

It is urged by counsel for the relator that this act is unconstitutional on several grounds. It is argued that under its provisions the privileges and immunities of citizens of the United States are abridged; that persons may be deprived of their liberty and property without due process of law; that it denies to certain persons within its jurisdiction the equal protection of the law; that it deprives certain people of the right to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures; that it compels certain persons in criminal cases to be witnesses against themselves; that it interferes with and attempts to regulate commerce between the state of Minnesota and other states; and, further, that it exceeds the power conferred by the state constitution, in that it attempts to delegate legislative powers, vested solely and exclusively in the legislative body.

⁴⁹⁴ 1. In the course of the argument relator's counsel have attacked the wisdom of this legislation, and have attempted to point out wherein the law has imposed onerous duties and obli-

gations upon those who come within its terms. But if this law is open to these criticisms, the remedy is with the people. The expediency of this enactment, and the propriety or wisdom of some of its sections, in which details are prescribed, are matters strictly within the legislative powers. If the act is inexpedient and unwise, or if some of its requirements are too exacting, the appeal should be to the representatives of the people, not to the courts.

2. Obviously, the act was not intended as a measure for the accumulation of a public revenue, and, if sustained at all, it must be upon the ground that it is a lawful regulation for the public good—a legitimate exercise of the police power of the state.

The design seems to have been to protect a large class of people engaged in agricultural pursuits, and more or less remote from market, from imposition and actual fraud when intrusting their products and produce into the hands of commission men for sale. And it is no argument against the statute to say that commission men are engaged in a legitimate business, and for that reason are not subject to police regulation, if the public good demands it. The operation of railways, the conducting of banks, the loaning of money at interest, the insurance business, the operation of custom gristmills, or grain elevators and warehouses, peddling from house to house, and the keeping of bakeries, butcher shops, hotels, restaurants, and saloons, are each legitimate and lawful occupations in this jurisdiction; but all may be subject to police regulation, and most of them are. But, of course, the right of the state to exercise police power over its citizens and their occupations is not unlimited.

The term "police power," as understood in American constitutional law, means simply the power to impose such restrictions upon private rights as are practically necessary for the general welfare of all: *Rippe v. Becker*, 56 Minn. 100. And it must be confined to such restrictions and burdens as are thus necessary to promote the public welfare, or, in other words, to prevent the infliction of public injury: *State v. Chicago etc. Co.*, 68 Minn. 381, 64 Am. St. Rep. 482. And in the exercise of its police powers a state is not confined to matters relating strictly to the public health, morals, and peace, but, as has been said, there may be interference whenever the public interests demand it; and in this particular a large discretion is necessarily vested in the legislature, to determine not only

what the interests of the public require, but what measures are necessary for the protection of such interests: *Lawton v. Steele*, 152 U. S. 133. If, then, any business becomes of such a character as to be sufficiently affected with public interest, there may be a legislative interference and regulation of it in order to secure the general comfort, health, and prosperity of the state, provided the measures adopted do not conflict with constitutional provisions, and have some relation to, and some tendency to accomplish, the desired end. The subjects which may be legislated upon are of necessity continually arising as business increases, and new phases, conditions, and methods appear. The development of the law relating to the proper exercise of the police power of the state clearly demonstrates that it is very broad and comprehensive, and is exercised to promote the general welfare of the state, as well as its health and comfort. And the limit of this power cannot and never will be accurately defined, and the courts have never been willing, if able, to circumscribe it with any definiteness.

The inquiry, then, is as to how and to what extent the business in question had become affected with public interests. What evils, or supposed evils, did the members of the legislature have in mind, and were attempting to remedy, when enacting this law?

The fact is that the public generally looked with distrust upon the methods of merchants engaged in selling agricultural products and farm produce upon commission, perhaps without good reason. It had become a matter of common talk among the people that those who handled wheat imposed upon their consignors by reporting sales and accounting for the proceeds at the lowest prices at which that article had been sold within the period of time during which the sale could have been made, and without regard to the prices actually obtained. With prices fluctuating at all times, as is the fact in the wheat market, and rarely remaining stationary ⁴⁰⁶ for more than a few minutes at a time, the opportunity for fraud seems to be without limit when selling this commodity on commission. In addition to this is the fact that the consignor usually resides at a considerable distance from the commission merchant, and is practically unable to discover whether he has been cheated or not. And, with respect to other agricultural products and farm produce, it is to be observed that they are largely of a perishable nature, and subject to rapid deterioration in transit, or after reaching the consignee. This fact gives to the latter

an opportunity to falsify his report of a sale to the distant consignor, and to insist that the article consigned had become more or less unmarketable before sale could be made; and here, as in the case of grain, the latter has little or no opportunity to ascertain the truth.

Without wishing to intimate that fraud of this nature had actually become so prevalent as to justify the accusation made, we do say that a majority of the people in this state had become convinced of the truth of these charges, and in great numbers besieged the legislature in behalf of the suppression of the alleged evil practices. This was a matter of common knowledge. It was publicly believed that the business of selling agricultural products and farm produce on commission had become saturated with false and fraudulent methods, to the great injury of a large class of our citizens, who were compelled to deal with commission men, and who were powerless to detect or prevent the wrong, and that the business had thus become sufficiently affected with public interests to be the proper subject of police regulation. We are of opinion that the legislature did not exceed its powers when, under the circumstances, it enacted a measure having relation to, and a tendency to accomplish, the desired end, such as is the law now before us.

This enactment was designed to prevent false and fraudulent practices of the character complained of, to correct the evils generally believed to prevail, and to compel the merchant to whom property was consigned for sale on commission to deal honestly and to be faithful to his trust. Such a law is not unusual. It only requires a consignee to render an account of his management of a consignor's property. "He holds himself out as a factor for the ⁴⁹⁷ management and sale of other people's property, and in that respect is like a public warehouseman": *Hawthorn v. People*, 109 Ill. 308, 50 Am. Rep. 610, a case in which a statute (much like the one at bar) requiring operators of butter and cheese factories on the co-operative plan to give bonds, and to make written reports of their business at the end of each month, was held to be constitutional, as a valid exercise of the police power.

3. But it is strenuously argued that this statute is void because it is discriminating or class legislation. In *State v. Cooley*, 56 Minn. 540, 550, it was said that class legislation is "legislation which selects particular individuals from a class, and imposes upon them special burdens, from which others of the

same class are exempt, and thus denies them the equal protection of the laws."

But the class here created consists of those who engage in the business of receiving agricultural products and farm produce for sale, or receive or solicit the same for sale; in short, those who are engaged in the business of selling the same. The class is as broad as it need be. The peculiar characteristics of the agricultural products and farm produce already referred to, and the liability to peculiar abuses resulting from a sale thereof on commission, are such as to suggest the practical necessity for distinctive legislation on the subject—different from what would be expedient or necessary in the case of other property sold on commission—and to justify the legislature, in its discretion, in putting those who sell such articles on commission in a class by themselves. It was the evils which were thought incident to the sale of agricultural products and farm produce which evoked the law. Here was a class of merchants who for certain reasons, hereinbefore specified, had peculiar opportunities to defraud, not common to other merchants, although they might sell on commission, and it was this class that the legislature proposed to put under restraint.

Nothing is proven by arguing that there are other lines of business conducted in quite as objectionable a manner; for, if the argument had merit, it would follow that all kinds of business which ^{are} need regulation must be legislated upon at the same moment. The legislature may proceed as the public welfare and prosperity of the citizens it represents may seem to demand. In this state the legislature has already regulated the method of conducting various kinds of legitimate business, and brought them under police enactment, as before stated. It has done this with respect to the business of insurance; it has required that bonds shall be filed and licenses obtained before any person shall undertake to conduct an employment bureau or agency; and it has compelled contractors upon public work to protect their employes and insure the payment of their wages by means of bonds, upon which those interested may maintain actions if necessary. These illustrations of what has been done in the proper exercise of the police power of the state could easily be continued, but it would serve no good purpose.

One point made against this statute is that it distinguishes and discriminates as between the persons it seeks to operate upon, in that it arbitrarily requires those who sell grain to

give bonds containing certain stated conditions, and to render certain statements and reports at once, while other persons brought within its influence must give bonds with wholly different conditions, and are not compelled to make these statements or reports. But there is an apparent and just reason for this distinction, as there is for distinguishing between the commission merchants mentioned in the law and other commission merchants; and it arises out of the peculiar conditions which surround the selling of grain, and to which we have before alluded.

The law was framed to meet the crying evils which it was believed had grown up in connection with this branch of business. The treatment of consignors was frequently most exasperating and injurious to them. Sometimes reports were never made of sales, and on other occasions were purposely delayed so that it would be difficult, if not impossible, for the consignor to ascertain the real facts of a given sale. Prices of grain fluctuated, not only from day to day, but from hour to hour. It might make a great difference to the consignor whether his grain was sold in the morning or near the close of the day. And for these reasons the law has, therefore, ⁴⁰⁰ studiously provided that the reports of sales shall state the day, hour, and minute when they are made. Such a provision was deemed a reasonable regulation in checking one of the alleged evils of the business—an evil which could not be remedied without special effort in the way of conditions not necessary to impose upon merchants handling other products and produce on commission. So the grain commission man has no reason to complain because he is compelled to heed certain provisions of the law which are not to be observed by commission men who sell other articles covered by the statute, for the conditions surrounding the sale are entirely different. And this is the fact with reference to the shipper. He has no right to object on the ground that the law throws around the property of another shipper greater safeguards than he has, provided the property of the other is of such a character as to demand other and greater protection.

Counsel for relator assume that the statute is objectionable because the farmer who consigns cattle, wool, or hides is not protected at all, while his neighbor who ships wheat or potatoes is. Admitting that cattle, wool, and hides are not agricultural products or farm produce, and therefore not covered by the law, we have no hesitation in saying that the conditions which

surround the consignment and sale upon commission of those articles are radically different from those pertaining to the consignment and sale of grain or other property strictly within the act, and this difference justified the distinction, if one there be. The market price of cattle, wool, or hides does not fluctuate from hour to hour, as does that of wheat, nor are they as perishable in their nature as the ordinary products of the farm, and therefore the opportunity for imposition is not so great. There is good ground in many ways for the distinction, if it has been made by the law. This statute treats all persons subject to it alike under similar circumstances and conditions in respect both of the privileges conferred and the liabilities imposed.

The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to ⁵⁰⁰ impair that equal right which all can claim in the enforcement of the law: *Soon Hing v. Crowley*, 113 U. S. 703, 705. And a law which is confined in its application to a particular class of persons is not void, as unequal class legislation, if the distinction is based on some reason of public policy, and applies to and embraces all persons alike under similar circumstances.

Finally, upon this point, it may be said that the requirement as to a bond does not affect the validity of the statute: *Brass v. North Dakota*, 153 U. S. 391, an instructive case upon the subject herein involved; also *Hawthorn v. People*, 109 Ill. 308, 50 Am. Rep. 610.

4. It is objected that the statute is an unlawful and forbidden interference with interstate commerce.

It is well settled that a law cannot be deemed a regulation of commerce among the states merely because it may incidentally or indirectly affect it: *Missouri etc. Ry. Co. v. Haber*, 169 U. S. 613. At most, this statute regulates the business of certain classes of commission men within this state, and is nothing but an ordinary police regulation, enacted in good faith, and intended to promote the general welfare and prosperity of the people within our borders. As was said in *Hennington v. Georgia*, 163 U. S. 299, 318: "Such a law, although in a limited degree affecting interstate commerce, is not for that reason a needless intrusion upon the domain of federal jurisdiction, nor strictly a regulation of interstate commerce, but,

considered in its own nature, is an ordinary police regulation designed to secure the well-being and to promote the general welfare of the people within the state by which it was established, and, therefore, not invalid by force alone of the constitution of the United States": See, also, *Plumley v. Massachusetts*, 155 U. S. 461; *Gladson v. Minnesota*, 166 U. S. 427.

And it may further be observed that the statute does not in terms apply to interstate business, and it will not be implied that the legislature intended to go beyond its lawful powers in enacting it. If, therefore, it be held that the legislature could not forbid one to engage in the business of a commission merchant, as to interstate shipments, without compliance with the provisions of the state statute, such statute should be construed to apply only to a local ⁵⁰¹ or domestic business; and such construction will be followed by the federal courts: *Osborne v. Florida*, 164 U. S. 650.

5. It is further contended that in this statute there is a delegation of legislative authority, in open defiance of the provisions of our state constitution. This is predicated upon the provision that the railroad and warehouse commission may fix the amount of the bond arbitrarily, and upon the assertion that it may capriciously accept a straw bond in one case and refuse the best possible bond in another.

It is true that the amount of the bond and the sufficiency of the surety are to be determined by the commission, but the presumption is that this will be done in a proper and just manner, not as counsel would seem to contend. Fixing the amount of such a bond, and the requirements as to sureties are purely administrative duties. It is necessary to lodge discretion somewhere, as manifestly it would be impracticable for the statute to prescribe the amount of bond for each of the numberless cases which arise. The possibility that the commissioners may not always act justly is no objection to the statute: *Cooley on Constitutional Limitations*, 197. Laws containing provisions of this nature are very common in this state, as well as in other jurisdictions, and need not be specified, nor need attention be directed to decisions elsewhere upholding them; for the subject involved is discussed and disposed of in *State v. Chicago etc. Ry. Co.*, 38 Minn. 281.

6. It is also argued that section 3 is unconstitutional, upon the ground that it violates the rights of the people of this state to be secure in their persons, houses, papers, and effects against

unreasonable searches and seizures; and also that it violates the provision that no person shall be compelled in any criminal case to be a witness against himself. We express no opinion upon the question, for it is not in the case. Conceding that the objectionable portions of section 3 are in direct opposition to the constitutional rights referred to, the law may stand, without these portions, as a full, complete, and enforceable statute. To the complaint on which the prisoner was arrested it is no defense to say that portions of section 3 are unconstitutional.

The court below ruled correctly in the proceedings, and, as provided ⁵⁰² in Laws of 1895, chapter 327, section 3, final judgment may be entered in this court discharging the writ and remanding the prisoner to the custody of the sheriff of Ramsey county for further proceedings. Let judgment be so entered.

The following opinion was filed November 10, 1899:

PER CURIAM. Counsel for relator in a petition for reargument urge two points to which brief reference should be made. The first is that for the purpose of sustaining the classification as made in the law, the court announced that certain conduct on the part of persons who handled wheat on commission had become a matter of common talk among the people of the state, and this announcement, counsel insist, is wholly without foundation,*and absolutely erroneous. Whether we were right or wrong in this is of no moment. The basis of the opinion, as is obvious from a reading, is that this particular business of selling agricultural products and farm produce is affected with a public interest, and is liable to abuse, and for these reasons is subject to police regulation by legislative act. Nothing more is necessary on this point.

The second point relates to the alleged arbitrary action of the railroad and warehouse commission when prescribing what is required of those who apply for licenses, copies of a circular letter issued by the commission and of the bond demanded being attached to the petition. It is enough to say on this point that this action cannot affect the validity of the law; and, further, that, if arbitrary and oppressive, there is an adequate and complete remedy in the hands of those who have cause for complaint.

Petition denied.

CONSTITUTIONAL LAW—REGULATION OF BUSINESS.—A law requiring operators of butter and cheese factories on the co-operative plan to give bonds for the faithful accounting for property received for manufacture is constitutional: *Hawthorn v. People*, 109 Ill. 302, 50 Am. Rep. 610. See, too, *People v. Wagner*, 86 Mich. 594, 24 Am. St. Rep. 141; monographic notes to *Butler v. Chambers*, 1 Am. St. Rep. 644-650; *State v. Goodwill*, 25 Am. St. Rep. 887-889.

ON GENERAL AND SPECIAL LAWS, see the monographic notes to *State v. Ellet*, 21 Am. St. Rep. 780-789.

HANSON v. INGWALDSON.

[77 Minnesota, 533.]

JUDICIAL SALES—DEFECTIVE DESCRIPTION OF LAND—CORRECTION.—If the description of land which an administrator is licensed by the probate court to sell is definite and certain, both in the license and all other records of the court in connection with the sale, and clearly identifies land which the deceased never owned, and no other, the administrator's sale is void, although his deed correctly describes the land of his intestate, and an order of the probate court, made many years thereafter, purporting to correct its records so as to describe the land of which the intestate died seised, is also void.

COTENANCY—ADVERSE POSSESSION OF GRANTEE.—If one cotenant attempts to convey the whole estate in fee by warranty deed, and his grantee records his deed, and by virtue thereof enters upon the estate and claims and holds exclusive possession of the whole thereof, the entry and claim are adverse to the title and possession of the other cotenant, and amount to a disseisin.

TENANT FOR LIFE—POSSESSION AS AGAINST REMAINDERMAN.—The possession of the tenant for life is never deemed to be adverse to the remainderman, as the latter has no right of entry or action for possession during the life term.

PARTITION—TENANTS FOR LIFE.—If the interest of the tenant in dower or other life tenant extends to the whole of the land of which partition is sought, an action therefor cannot be maintained against the life tenant, nor can the judgment affect his estate, but if the life estate extends to a part only of the land to be partitioned, an actual partition or sale thereof may be had, although it affects the life estate.

Duxbury & Duxbury, for the appellants.

J. O'Brien, for the respondent.

584 **START, C. J.** Action for partition of twenty acres of land in section 13, township 101, range 6, in Houston county. The complaint alleges that the father of the plaintiffs, Peter Hanson, died intestate, seised of the land, and that each of

the plaintiffs now owns an undivided one-fourth and the defendant the remaining undivided one-half thereof. The answer admits that Peter Hanson died seised of the land, and alleges that the defendant has acquired the whole title thereto through an administrator's sale thereof to his grantor, and also by adverse possession. The trial court made findings of fact in favor of the defendant as to both defenses, and ordered judgment for him. The plaintiffs appealed from an order denying their motion for a new trial.

1. As to the first defense, the plaintiffs' assignments of error may all be considered under the general question: Was the evidence competent and sufficient to support the findings of the trial court to the effect that the whole premises were duly sold by the administrator of Hanson to the defendant's grantor?

The father of the plaintiffs, Peter Hanson, died intestate January 24, 1868, seised of no other land except the north one hundred and twenty acres of the northeast quarter of section 13, township 101, range 6, in the county of Houston, of which the twenty acres here in controversy are a part. He left him surviving his widow and four minor children, two of whom died unmarried, intestate, and without issue. The widow is still living, and in 1870 she married the defendant's grantor, Knud ⁵³⁵ Halgrimson. The plaintiffs are now the only surviving children, and each of them became of legal age more than fifteen years prior to the commencement of this action, in June, 1898. On January 7, 1871, Asle Swenson was duly appointed administrator de bonis non of the estate; and on May 30, 1871, as such administrator, he executed and delivered a deed, which was duly recorded on that day, of the one hundred and twenty acres of which his intestate died seised, subject to the dower rights of the widow, to Knud Halgrimson, in consideration of twelve hundred dollars. This deed correctly described the property and recited all of the jurisdictional steps necessary to make a valid administrator's sale of the land. On March 4, 1875, Halgrimson and wife, the widow of Hanson, by a joint warranty deed, dated on that day, and duly recorded on December 6, 1875, purported to convey to the defendant herein the whole title to the twenty acres here in question in consideration of five hundred dollars, which he paid to them; and thereupon, without any knowledge or notice in fact of any defects in the administrator's sale affecting his title, he entered into possession of the premises,

under his deed, on March 4, 1875, and has been ever since in the actual and exclusive possession of the whole thereof.

There is no substantial dispute between the parties as to the foregoing facts, but the records of the probate court received in evidence show that in the inventory of Hanson's estate, and in all other records and papers relating to the sale, except the administrator's deed, the land was described as situate in section 13, township 101, range 5, instead of range 6. After the commencement of this action, but before the trial thereof, the administrator of Hanson's estate petitioned the probate court to correct such records and papers by substituting range 6 for range 5 in the description of the land wherever it occurred therein. The probate court granted the petition. The trial court found that in all of the proceedings in the probate court it was the land actually owned by Hanson at the time of his death which was intended to be described therein, and to be and was actually sold, and that range 5, instead of range 6, was inserted in the description of the land by mistake. The evidence justifies such finding, but the question here is not what the unexecuted intention was. The question is, Does it appear from the records that the administrator was licensed to sell the north one hundred and twenty ⁵³⁶ acres of the northeast quarter of section 13, township 101, range 6, of which Hanson died seised?

It appears from the records that the land the administrator was licensed to sell was particularly described therein as being six miles east of that owned by Hanson; that is, in range 5, instead of range 6. It is to be noted that there is no indefiniteness in this description, for it is specific, and necessarily negatives any inference that it includes the land in question. The defendant, however, claims that in the petition for license, order, notice of sale, and confirmation, the land is described as that of which Peter Hanson died seised, and that the particular description must be rejected as false; and that, if this be done, the identity of the land is clearly established by the general description. The case of *Buntin v. Root*, 66 Minn. 454, is relied on in support of this proposition. The case cited, however, is not in point; for in that case the particular description of the land in the order of license was simply indefinite, but was made certain by the recitals therein. In this case the description of the land the administrator was licensed to sell was definite and certain, and clearly identified land which the deceased never owned, and no other. If this

particular description were rejected, as suggested, the records would not identify any land whatever. The petition for license is entitled, "In the Matter of the Estate of Peter Hanson, Deceased," and states the amount of the personal estate, the disposition thereof, the amount of the unpaid debts, and that the "deceased died seised of the following described real estate." Then follows a specific description of the north one hundred and twenty acres of the northeast quarter of section 13, township 101, range 5. The petition contains no other description or designation of the land to be sold. The license, so far as here material, was in these words: "In the matter of the application of Asle Swenson for authority to sell the real estate of said Peter Hanson for the payment of his debts. Pursuant to an order of this court made in said matter on the 21st day of January, A. D. 1871, the petition of Asle Swenson, praying for license to sell all of the real estate whereof said Peter Hanson died seised, was this day heard and considered. . . . It is ordered that said Asle Swenson be, and he is hereby, licensed and authorized to sell the following described lands, viz.: The ⁵³⁷ north $\frac{1}{4}$ of northeast $\frac{1}{4}$ of section 13, Town 101, range 5, and north $\frac{1}{4}$ of south $\frac{1}{4}$ of northeast $\frac{1}{4}$ of section 13, Town 101, range 5."

If the particular description of the land be stricken from this license, it is obviously a nullity; but with the particular description it authorizes the administrator to sell a specific one hundred and twenty acres in range 5, and no other. It follows that the administrator was never licensed to sell the one hundred and twenty acres in range 6, of which his intestate died seised, and therefore the attempted sale of the latter by the administrator was not simply irregular, by reason of a clerical mistake, but absolutely void. It also follows from this proposition, as a simple corollary, that the attempt of the probate court to correct the records, so far as to substitute in the order of license land in range 6 for land in range 5, was a nullity: *Kurtz v. St. Paul etc. R. Co.*, 65 Minn. 60. We have reluctantly reached the conclusion that the administrator's sale was void, for there are no equities to support the plaintiffs' claim.

2. This brings us to the question whether the defendant has acquired title to the land in question by adverse possession. He acquired, by the deed under which he entered into possession of the land, the life estate of the widow of Hanson in an undivided one-third thereof; also an undivided in-

terest in fee—the plaintiffs concede that it was an undivided one-half. He was therefore a tenant in common with the plaintiffs, who claim that his possession was not adverse as to them, because the possession of one tenant in common is not to be presumed to be adverse to his cotenants. Such is the general rule; but where one tenant in common attempts to convey the whole estate in fee by warranty deed, and his grantee records his deed, and by virtue thereof enters upon the estate, and claims and holds exclusive possession of the whole thereof, the entry and claim must be deemed adverse to the title and possession of his cotenant, and amount to a disseisin: *Ricker v. Butler*, 45 Minn. 545; *Freeman on Cotenancy*, sec. 224. Such was this case, and the defendant would now be the sole owner of the whole of the premises in question, except for the life estate of the widow in an undivided one-third thereof.

When the defendant entered under this deed, the plaintiffs in fact owned an undivided one-half of the premises, subject to the ^{widow's} widow's dower right, a life estate in an undivided one-third of the whole premises, or a life estate in an undivided one-sixth of their moiety, leaving them an undivided one-third of the whole not subject to dower. As to this undivided one-third, they could have asserted their right to it at any time after they reached their majority, which was more than fifteen years before the commencement of this action; hence, as to this third, the action is barred—that is, the defendant has acquired title thereto by adverse possession. But the undivided one-sixth of the land which is still subject to the life estate, as against the plaintiffs, stands upon a different basis. As to it they are reversioners, and the defendant a tenant for the life of another. The possession of the tenant for life is never deemed to be adverse to the remainderman, for the latter has no right of entry or action for possession during the life term. Therefore, this action is not barred as to such undivided one-sixth: *Allen v. De Groodt*, 98 Mo. 159, 14 Am. St. Rep. 635, notes.

It follows that the plaintiffs own in fee an undivided one-sixth of the land subject to the life estate, and that the defendant owns the life estate and an undivided five-sixths of the land in fee.

3. It is further claimed that the plaintiffs cannot have partition as to their undivided interest because the widow is still living and the claim of the tenant in dower is still in force. It is true that, where the interest of the tenant in dower or

other life tenant extends to the whole of the land of which partition is sought, the action will not lie against the life tenant, nor can the judgment affect his estate: *Smalley v. Isaacson*, 40 Minn. 450. In such case, there is no necessity for disturbing the tenant in dower or other life tenant; for there can be an actual partition, as between the reversioners, by each taking his share in severalty, subject to the life estate, or the whole may be sold subject to such estate; hence the statute (Gen. Stats. 1894, sec. 5778) expressly provides that a judgment in partition shall not affect tenants in dower, or by curtesy or for life, to the whole of the property which is the subject of the partition. But where the life estate extends only to a part of the land to be partitioned, an actual partition or sale thereof may be had, although it affects the life estate. It is not necessary, in such a case, that the plaintiff should have a present right of possession: ⁵³⁹ Gen. Stats. 1894, secs. 5770, 5777, 5792; *Cook v. Webb*, 19 Minn. 129 (167); *Bonham v. Weymouth*, 39 Minn. 92; *Smalley v. Isaacson*, 40 Minn. 450.

The trial court erred in directing judgment for the defendant as to the entire interest in the premises, and the order denying plaintiff's motion for a new trial must be reversed and a new trial granted as to the undivided one-sixth thereof. So ordered.

A DEFECTIVE DESCRIPTION OF REAL PROPERTY in a guardian's petition for an order of sale and also in the order to show cause does not affect the jurisdiction of the court nor the validity of the sale if the property was sufficiently described in the order of sale: *Scarf v. Aldrich*, 97 Cal. 360, 33 Am. St. Rep. 190.

ADVERSE POSSESSION.—A COTENANT WHO SELLS and conveys the whole of the land held in common, and gives possession thereby creates in the grantee a title and possession adverse to the other cotenant or cotenants, and if such grantee continues to hold for the statutory period of limitation, he thereby acquires a good title as against them: *King v. Carmichael*, 136 Ind. 20, 43 Am. St. Rep. 306.

THE POSSESSION OF A LIFE TENANT cannot be adverse to the remainderman: *Lumley v. Haggerty*, 110 Mich. 552, 64 Am. St. Rep. 364; *Bowen v. Brogan*, 119 Mich. 218, 75 Am. St. Rep. 387.

PARTITION OF LIFE ESTATE.—A remainderman or reversioner cannot maintain partition against the tenant for life in possession: *Savage v. Savage*, 19 Or. 112, 20 Am. St. Rep. 795. An estate held by one by curtesy only is not subject to partition as against the remaindermen: *Atkinson v. Brady*, 114 Mo. 200, 85 Am. St. Rep. 744.

UELAND v. JOHNSON.

[77 Minnesota, 543.]

JUDGMENTS—SERVICE OF SUMMONS ON WRONG PERSON.—If summons in an action names "John Lynch" as defendant, and is personally served on "John M. Lynch," who is not the person upon whom the summons ought to have been served, a judgment taken against the latter by default, upon his failure to appear, is nevertheless valid until regularly vacated or set aside.

JUDGMENTS—SERVICE ON WRONG PERSON—MOTION TO VACATE.—If summons in an action names "John Lynch" as defendant, and is personally served on "John M. Lynch," a judgment by default against the latter is valid until vacated, and the trial court may entertain his motion to vacate it and permit him to answer upon condition that he pay costs.

J. M. Lynch and C. J. Berryhill, for the appellant.

A. Ueland, for the respondent.

⁵⁴⁴ **START, C. J.** This action was brought in the district court of the county of ⁵⁴⁵ Hennepin against John Lynch and others to enforce their respective liability as stockholders of the Washington Bank, an insolvent corporation. The complaint alleged that the defendant John Lynch (not John M. Lynch) was the owner of six shares of the capital stock of the bank, and other facts sufficient to constitute a cause of action against him. The summons named John Lynch as defendant, and recited that the complaint was on file in the clerk's office. It was personally served on the appellant herein, John M. Lynch, on February 25, 1897. He did not appear, and judgment was entered against the defendant John Lynch, by default, January 25, 1898. On March 25, 1899, the appellant moved the district court to set aside the judgment, and for leave to answer the complaint. The proposed answer denied that the appellant was the John Lynch named as one of the defendants in the action, and denied that he was, or ever had been, a stockholder of the Washington Bank. The trial court made its order setting aside the judgment and granting the appellant leave to answer on payment of seventy-five dollars costs. He appealed from the order.

The appellant's first claim is that the service of the summons and the judgment are absolutely void as to him because he is not the John Lynch named in the summons and complaint as defendant.

The John Lynch named in the action as defendant is admittedly the person who is charged in the complaint with the ownership of six shares of the stock of the bank. Whether

the appellant is that person is the very issue which he tendered by his answer. The summons was personally served upon him, and he was thereby advised that the plaintiff claimed that he was the John Lynch who owned the stock, as charged in the complaint, and he was thereby called upon to come into court and meet the issue. He made default, and the court by its judgment necessarily determined the issue against him. He now asks the court to relieve him of his default, and permit him to answer and meet the proposed issue—a proceeding wholly illogical and inconsistent if the judgment is void. The judgment was neither void nor irregular: *Gorman's Case*, 124 Mass. 190. The cases cited and relied upon by the appellant are not in point, for they are cases where the name of the person upon ⁵⁴⁰ whom the process was served and the name of the defendant therein were not the same; for example, where a summons against John Brown was served on John Smith. Whether the cases cited state the law correctly, we need not stop to inquire, for they are radically different in their facts from this case. The summons in this case named John Lynch as the defendant, and it was personally served on John M. Lynch, the appellant. The omission of the middle initial letter in the name was immaterial. He had no right to assume that some other John Lynch was intended, and it was his own fault that he did not come into court in answer to the summons, and contest the allegations of the complaint that he was a stockholder—a question upon which his identity depended.

The judgment being valid, his motion was addressed to the discretion of the trial court, and the order appealed from must be affirmed, unless the court erred in imposing terms as a condition of permitting him to answer. The appellant claims that in no event could the costs imposed exceed ten dollars, as provided by section 5506 of the General Statutes of 1894. They were not imposed under this section, which refers to costs which may be allowed to the prevailing party upon a decision of a motion or demurrer. It is perfectly evident from a reading of the order that the payment of the seventy-five dollars as a condition of answering was imposed as terms under the provisions of section 5267 of the General Statutes of 1894. The fact that the court labeled the amount to be paid as "costs" is not significant.

Lastly, the appellant claims that the amount imposed was excessive, and therefore an abuse of discretion on the part of

the court. The amount is ten per cent of the judgment, and under ordinary circumstances would be excessive. But this is not an ordinary case, for the appellant's negligence in failing to appear in response to the summons and his delay in applying to the court to be relieved from his default are great and unexcused. The opening of the judgment against the stockholders, as against him, will necessarily be attended with costs and expenses by the receiver, which might have been avoided, except for appellant's negligence. We are not prepared to hold that the trial court abused its discretion in imposing the condition.

Order affirmed.

JUDGMENT.—SERVICE OF PROCESS upon Asher B. Bates will not support a judgment against Ashley B. Bates: *Bates v. State Bank*, 7 Ark. 394, 46 Am. Dec. 293. A judgment against F. Olsen, "full name unknown," is void as a judgment against Ferdinand Olsen, if summons was not personally served on him: *Enowold v. Olsen*, 39 Neb. 59, 42 Am. St. Rep. 537.

DEFECTIVE SERVICE OF PROCESS is discussed in the monographic note to *Sanford v. Edwards*, 61 Am. St. Rep. 485-494.

CASES
IN THE
SUPREME COURT
OF
MISSOURI

BATES v. ST. LOUIS.

[158 Missouri, 18.]

OFFICERS—SALARY.—A public officer is not entitled to his salary by virtue of a contract, express or implied. His right to such compensation exists as a creature of law, and as an incident to the office.

OFFICERS—SALARY DURING ABSENCE.—The right of a public officer to his fees, emoluments, or salary is such only as is prescribed by statute, and while he holds the office, such right is in no way impaired by his occasional or protracted absence from his post, or neglect of duty, or failure to perform any substantial service.

OFFICERS—SALARY DURING ABSENCE.—The mayor of a city is entitled to his salary during his temporary absence from his post of duty, although the city charter provides that during the absence of the mayor from the city another city officer shall act as mayor and shall "receive the same compensation as the mayor."

H. A. Haenssler and C. S. Reber, for the appellants.

B. Schnurmacher and C. C. Allen, for the respondents.

¹⁰ **BRACE, P. J.** This is a proceeding in equity by injunction to restrain the city treasurer from paying the defendant Walbridge, at that time mayor of the city, his salary as such for three specified days in the month of March, 1896, during which time it is alleged in the petition he was absent from the city on business not pertaining to the business of his ²⁰ office as mayor, and the duties thereof were performed by the proper officers designated by the charter, who received therefor the same salary that the mayor himself would have been entitled to receive. A demurrer to the petition was sustained and from the judgment thereon the plaintiffs appeal.

It is contended for the appellants that the mayor of St. Louis is not entitled to the salary of his office while absent from the city on purely personal business, and this contention is based on section 17, article 4, of the charter, which reads as follows: "The president of the council shall perform the duties of mayor whenever and so long as the mayor, from any cause, is unable to perform his official duties. If the mayor and the president of the council are both absent from the city, or otherwise disabled from performing the duties of the mayor, the speaker of the house of delegates shall, for the time being, discharge the duties of said office, and either of them, while acting as mayor, shall receive the same compensation as the mayor."

It is well-settled law that "a public officer is not entitled to compensation by virtue of a contract, express or implied. The right to compensation exists, when it exists at all, as a creature of law and as an incident to the office. . . . "The salary belongs to him as an incident to his office, and so long as he holds it; and, when improperly withheld, he may sue for and recover it. When he does so he is entitled to its full amount, not by force of any contract, but because the law attaches it to the office": *Givens v. Daviess Co.*, 107 Mo. 608, 610; *Fitzsimmons v. Brooklyn*, 102 N. Y. 536, 55 Am. Rep. 835; *State v. Walbridge*, 153 Mo. 194.

As is well said in *Throop on Public Officers*, section 500, quoting from *Robinson, J.*, in *People v. Green*, 5 Daly, 268, 269: "The right of an officer to his fees, emoluments, or salary is such only as is prescribed by statute; and while he²¹ holds the office, such right is in no way impaired by his occasional or protracted absence from his post, or neglect of his duties. Such derelictions find their corrections in the power of removal, impeachment, and punishment provided by law. The compensations for official services are not fixed upon any mere principle of quantum meruit, but upon the judgment and consideration of the legislature, as a just medium for the services which the officer may be called upon to perform. This may in many cases be extravagant for the specific services, while in others they may furnish a remuneration which is wholly inadequate. The time and occasion may, from change of circumstances, render the service onerous and oppressive, and the legislature may also increase the duties to any extent it chooses; yet nothing additional to the statutory reward can be claimed by the officer. He accepts the office 'for better

or worse'; and whether oppressed with constant and overburdening cares, or enabled from absence of claim upon his services to devote his time to his own pursuits, his fees, salary, or statutory compensation constitutes what he can claim therefor, and is yet to be accorded, although he performs no substantial service, or neglects his duties. . . . The fees or salary of office are 'quicquid honorarium,' and accrue from mere possession of the office."

Counsel for the appellants seem to concede that such is the law, but contend that the rule is changed by the provision of the section of the charter aforesaid which devolves the duties of the mayor upon the president of the city council or upon the speaker of the lower house of delegates, as the case may be, during the absence of the mayor from the city, and provides that he, while acting as mayor, "shall receive the same compensation as the mayor," which, it is contended, ought to be construed to mean that such officer is to receive not "the same compensation as the mayor," but "the compensation of the mayor." In order to sustain this contention, we would ²² have to reconstruct this provision of the section by striking out the words "same" and "as," and inserting the word "of" in the place of the word "as" in the sentence. We know of no canon of construction that would authorize us to do so. There is no ambiguity in the section. Its meaning is expressed in clear and unmistakable language, and we have no authority to add to, or to take from it, any of its terms. The compensation of the mayor is thereby made the standard by which the compensation of the officer who in his absence acts for him is to be measured, and nothing more. It does not operate upon the compensation of the mayor at all, and it is not possible to give it any other force or meaning. The argument in support of this contention might be well enough if addressed to the law-making power. Its force may have been appreciated by the framers of the former city charter, for it seems that in the charter of 1870, by section 9 of article 5, it was provided that the president of the city council, when discharging the duties of the mayor during his absence from the city, should receive "the compensation of the mayor," but certainly was not appreciated by the framers of the present charter who with this provision of the old charter before them deliberately eliminated that feature thereof, and substituted therefor the present provision. It was entirely within their power to so change the law in this respect, and it is not within our power

to reverse their action. Our province, in the absence of ambiguity, is simply to construe the law as it is written. And so construing it, we find nothing in this section requiring that any deduction should be made from the salary of the mayor, by reason of his absence from the city as charged in the petition. The circuit court, therefore, committed no error in sustaining the demurrer, and its judgment thereon is affirmed.

All concur, except Marshall, J., not sitting.

PUBLIC OFFICE—NATURE OF.—An office is a delegation of a portion of the sovereign power of the state; it is not created by grant nor by contract: See the monographic note to *State v. Hecker*, 63 Am. St. Rep. 185, on what are public offices.

OFFICERS.—SALARY is an incident of office and belongs to the person holding the title to the office: *State v. Carr*, 129 Ind. 44, 28 Am. St. Rep. 163; *Ward v. Marshall*, 96 Cal. 155, 31 Am. St. Rep. 198.

STATE v. KEOKUK AND WESTERN RAILROAD CO'

[153 Missouri, 157.]

TAXATION OF RAILROAD PROPERTY TO PAY RAILROAD BONDS.—If, under the law in force at the time that a railroad is built, and when a county issues its bonds to be exchanged for stock subscribed by the county in such railroad company, the property of the company in the county is liable for taxation to pay the principal and interest on such bonds, it remains thus liable although such bonds are refunded and reissued for the same debt after the railroad property has changed hands and passed to a new owner, and although the law may have been changed since the issue of the old, and before the issue of the new, bonds.

TAXATION—"ALL PROPERTY."—If words of general description are used in reference to taxation, such as the words "all property," they include all kinds of property not expressly or by necessary implication excepted.

TAXATION OF RAILROAD PROPERTY TO PAY RAILROAD BONDS.—If a statute provides that a county subscribing for stock in a railroad company shall become entitled to all privileges granted and subject to all liabilities imposed by the statute or the company's charter, and that it is authorized to levy a tax on all property legally taxable for county purposes to raise funds to pay such subscription, and that taxpayers who shall have paid assessments for such subscription shall be entitled to a transfer of the county's stock equal to their assessment, the property of the railroad company lying in the county, and whose road is constructed while such statute is in force, is subject to taxation to pay county bonds issued to pay the county's subscription for such railroad stock.

F. T. Hughes and E. Higbee, for the appellant.

Fogle & French and T. W. Baird, for the respondent.

¹⁶¹ VALLIANT, J. This is a suit for delinquent taxes assessed for the year 1894 against property of the defendant corporation in Schuyler county. The pleadings are in due form and the cause was submitted to the court upon the following agreed statement of fact: "Upon the consent of the parties, a jury was waived and the cause submitted to the court for hearing. It was agreed in open court by both parties that this is a suit against the defendant, the Keokuk and Western Railroad Company, for taxes levied to pay interest on county bonds of said Schuyler county issued in 1892, and to pay the interest on Liberty township bonds of said county, described in this suit, issued in the same year. And it is further agreed that all the necessary steps have been legally taken for the assessment and levying of the taxes sued for, and that there is no dispute as to the amounts of the taxes sued for, provided that the court shall hold that the plaintiff is legally entitled to recover the said taxes under the other facts and agreements herein made.

"It is further agreed that all the taxes herein sued for were levied to pay interest on the said township and county bonds; that said bonds were issued by said county on behalf of itself and said Liberty township for the purpose of taking up and ¹⁶² exchanging same for other bonds which had been issued in 1871 by said county and township and delivered to the Missouri, Iowa, and Nebraska Railroad Company for stock subscribed and taken in the last-named railway company to aid said company to then construct its railway through said county, and said bonds were received and disposed of and the proceeds used in such construction. It is agreed all the county bonds in suit are the third issue of the original bonds issued for stock to the Missouri, Iowa, and Nebraska Railroad and are renewal and refunding bonds.

"That the railroad was constructed and completed through said county and township in about the year 1871, and was operated and remained in about the same condition until 1886, when the said railway and its franchise were purchased by this defendant, the Keokuk and Western Railroad Company, under a decree of foreclosure and sale of a mortgage placed upon the said railway and franchise by the said Missouri, Iowa, and Nebraska Railway Company in the year 1870.

"That this defendant has owned and operated said railway and franchise since its said purchase in 1886, and still owns and operates the same, and that the property is practically in the same condition as when purchased.

"The foregoing stipulation was all the evidence offered or received in the cause. Whereupon the defendant prayed the court to declare the law to be as follows: 'The court, upon the evidence and pleadings in this case, will find for the defendant,' which declaration the court refused to give, to which refusal of the declaration prayed for the defendant, by its counsel, did then and there at the time except."

The finding and judgment were for the plaintiff for eleven hundred and twenty-eight dollars and eighty-one cents, upon which a motion for new trial followed, which was overruled, and this appeal taken. The statement of the case on behalf of the respondent contains a history of the transactions relating to the county's subscription, issuances of original and afterward refunding bonds, foreclosure sale of ¹⁸⁸³ the original railroad, its purchase by the defendant, etc. But appellant's counsel in their supplemental brief object to those details as no part of the record, and insist that the review of the case on this appeal should be limited to the agreed statement of facts, and we will do so.

The proposition of the appellant is that the county, having subscribed to the capital stock of the railroad company to assist in the construction of its road, has no right to include the railroad company's property in the assessment levied on property in the county to pay the subscription; that although the bonds now outstanding to pay the interest on which this tax is sought to be levied are refunding bonds, issued after the defendant company had bought the property of the old company, yet they represent the same debt, and if the property in the hands of the original company would not have been liable to a tax to pay the original bonds, it would not be liable in the hands of the present owner, who bought it subject only to burdens it bore in the hands of the original owner; and since the present owner was not a party to the refunding contract, its rights could not be affected by the contract made between the county and the then holders of the old bonds.

Appellant is right in its contention that the question of its liability must be carried back to the original contract between the county and the original railroad company, to whose capital stock it became a subscriber. If the property of the rail-

road company was not liable to a tax levied to pay those bonds, it is not liable to a tax to pay these, because these are but the novation of those, and represent the county's liability to pay the same debt. And the fact that these bonds may differ in their terms, and new considerations enter into them, cannot affect this appellant, who was no party to that contract. Nor can the fact that the law of the state may have been changed since the issue of the old and before the issue of new bonds make any difference, for the state cannot pass a law that will have the effect to impair the obligation of a contract. ¹⁰⁰ All contracts, however, are to be construed as embracing the law applicable to them at the time they are made, and if the law at that time subjects a contract made under its provisions to changes in a certain particular which thereafter may be made in the law, such change would not impair the obligation of the contract. But even that principle would not help the plaintiff in this case if he was forced to rely upon it, because there was nothing in the law at the time the subscription was made that rendered the contract subject to change in the law.

When the defendant railroad company, appellant here, bought the property of the old company under foreclosure sale, this bonded debt was then outstanding, and if the property was not then liable to a tax to be levied to pay it, it is not liable now. This company as vendee is bound in this respect by the contract made by its involuntary vendor, but it is not bound by a contract made by the county with the subsequent holder of the bonds. All this being conceded to appellant brings us to the consideration of its first proposition, viz., that under the law as it was at the date of the county's subscription the railroad company's property could not be included with the other property in the county taxed to pay the subscription.

For authorities supporting this proposition appellant relies chiefly on *Applegate v. Ernst*, 3 Bush, 648, 96 Am. Dec. 272, followed in two other cases in that state, and *Murray v. Charleston*, 96 U. S. 432. There are also two Georgia cases referred to—*Miller v. Wilson*, 60 Ga. 505, and *Mayor etc. v. Jones*, 67 Ga. 489. The first Georgia case referred to is to the effect that under an act of the legislature authorizing the levy of a tax on "the taxable property in the state," in the absence of express words including bonds of that state, and in view of the custom that had theretofore existed not to include

them, such bonds were not to be listed for taxation. The second Georgia case applied the same principle to an ordinance of the city of Macon, in reference to its city bonds.¹⁶⁵ Those decisions do not go to the extent of holding that the legislature could not authorize the levy of a tax on the state bonds.

In *Murray v. Charleston*, 96 U. S. 432, the city of Charleston had borrowed money and issued its bonds in payment of the same, bearing six per cent interest, which were held by a resident of Germany. The city passed an ordinance to levy a tax, and included those bonds in the list for taxation, directing the tax as to them to be collected by the city treasurer, retaining two per cent at the time of paying the interest. The court held that to allow that would be in effect simply to reduce the obligation to pay six per cent interest to an obligation to pay only four per cent, and that therefore the ordinance was obnoxious to that provision of the United States constitution which forbids a state to pass a law impairing the obligation of a contract. In that case the court say: "Debts are not property. A nonresident creditor cannot be said to be, in virtue of a debt due to him, a holder of property within the city; and the city council was authorized to make assessments only upon the inhabitants of Charleston, or those holding taxable property within the same. To that extent the supreme court of the state has decided the city has power to assess for taxation. That decision we have no authority to review." The court then go on to discuss the power of a state to tax its own bonds and say: "Is, then, property, which consists in the promise of a state or of a municipality of a state, beyond the reach of taxation? We do not affirm that it is." The court then quote from the works of Alexander Hamilton: "The true rule of every case of property founded on contract with the government is this: It must first be reduced into possession, and then it will become subject, in common with other similar property, to the right of the government to raise contributions upon it." Two cases are referred to in the opinion, *Champaign Co. Bank v. Smith*, 7 Ohio St. 42, and *People v. Home Ins. Co.*, 29 Cal. 533, in ¹⁶⁶ which those courts held a tax on the bonds of the respective states valid, and those decisions were not considered in conflict with the principle decided in that case. If, in the Charleston case, the owner of the bonds had disposed of them in the purchase of real estate or other property situate in the city, un-

der the reasoning of the court in that case, such property would clearly have been subject to taxation like other property in the city, to pay those bonds, whilst the bonds themselves would not have been.

The Kentucky case—*Applegate v. Ernst*, 3 Bush, 648, 96 Am. Dec. 272—is more in line with the position taken by appellant than any other authority cited. In that case the county had subscribed to the capital stock of the railroad company and issued bonds in payment of same which were delivered to the railroad company, and their proceeds used in constructing the road in that county. When it was attempted to include the part of the railroad within the county in the list of property subject to taxation to pay those bonds, the Kentucky court held that such could not be done, primarily because a railroad was an entirety and could not be levied on in fragments, and having held the tax invalid for that reason, then it proceeded to say that moreover the railroad constructed by aid of the subscription could not be made liable to contribution to pay the subscription, using this language: "If liable for any portion of that subscription, it would, to that extent, pay the debt of the stockholders or remit so much of the amount subscribed to itself, and consequently would get that much less than the subscription to it for its use. . . . To tax the road itself for that selfish purpose would be repudiation to the extent of the tax." This case was afterward expressly overruled as to the first ground on which the decision rested (*Franklin County Court v. Louisville etc. Ry.*, 84 Ky. 59), but has been followed on the second point in two other Kentucky cases, cited in appellant's brief. The learned counsel for appellant in their brief say that they have "searched the books in vain to find where any court has ever ¹⁸⁹⁷ questioned this line of cases," etc. If the reference is to the Kentucky cases, it would, perhaps, not be improper to say that whilst we have seen no cases questioning them, we have not been referred to the decision of any court in which they are followed, although their justice is commended in *Rorer on Railroads*, 1500. A further quotation from the *Applegate* case is: "The object of the tax enjoined is inconsistent with the obligations of the county of Pendleton to pay a specific sum for stock in the railroad, to aid other stockholders to make and equip the road." The deduction intended to be drawn from this is that if the county is allowed to get back in the way of taxation on the railroad any part of the subscription price of

its stock, it gets more stock than it pays for, and is placed in a position of advantage over other stockholders who have to pay the full amount for their stock without any drawback. But whatever might have been the conditions of the county's subscriptions under the Kentucky statute, the result of inequality above indicated would not be reached under our statute. The Kentucky case was founded on a statute of 1859, and was decided in 1868, when the law governing rights and liabilities growing out of county subscriptions to the capital stock of railroad companies had not been as thoroughly tested by experience as it has since. We have no doubt the Kentucky court understood its own statute much better than we do, and that its decision was wise and just as an interpretation of its statute, but it affords us no assistance in the interpretation of our statute, which possesses some important features of its own.

This subscription was made in 1871 to the Missouri, Iowa, and Nebraska Railroad Company, and the law of this state as it was at the date of the subscription relating to or affecting the rights and liabilities both of the county and the railroad company is to be read into that contract as a part of it.

In section 18, chapter 63 of the General Statutes of 1865 is the provision quoted in the brief of appellant to the effect that ¹⁸⁶⁵ upon the making of the subscription the county shall become, "like other subscribers to such stock, entitled to the privileges granted, and subject to the liabilities imposed, by this chapter, or by the charter of the company in which such subscriptions shall be made"; and continuing, it is in the same section further provided that, in order to raise funds to pay the subscription, the county court shall "levy a special tax upon all property made taxable by law for county purposes," etc. And at that time section 16, article 11, of the constitution declared: "No property, real or personal, shall be exempt from taxation, except such as may be used exclusively for public schools, and such as may belong to the United States, to this state, to counties, or to municipal corporations within this state." These provisions of the statute and constitution are a part of the contract in so far as they are applicable to it. It is not contended by appellant that its property sought to be subjected to this tax is not within the description contained in the above quotation from the statute, to wit, "property made taxable by law for county purposes"; indeed, the counsel for appellant in their second brief disclaim that it is

exempt from general taxation, but insist that it is exempt from taxation for this particular purpose only.

When the legislature undertook to empower the county to raise funds to meet the obligation, it specified what property should be subject to the tax, and when the railroad company accepted the county's subscription it knew from what source such funds were to come, and it became the agreement of both parties to the contract that all property coming within that description should be subject to taxation for that purpose. It would not be contended that there would be any inconsistency with the county's undertaking or any impairment of its contract if, at the time the contract was entered into, the statute had expressly said that for the purpose of raising funds to pay the subscription the county court should "levy a special tax upon all property made taxable by law ¹⁰⁰ for county purposes," including the property of the railroad. The power of the legislature to make such a provision at the time is not questioned. If the railroad property is included in the general description, there would be no extra force given to the description by adding that it is intended to include the railroad property. Where words of general description are used, they cover everything of that kind not expressly or by necessary implication excepted. The learned counsel for appellant say: "The railroad would have been bound to have helped pay such subscription if the legislature had plainly said so." If the legislature had a right to include the railroad property in the taxation, it had no right to exclude it; to have attempted to do so would have been in the face of the constitutional provision above quoted.

The inequality referred to in discussing the Kentucky cases, whatever it may have been under the statute of that state, is entirely avoided by the express terms of our statute, under which the county gets no more stock than it pays for and pays as much as any other shareholder for the shares it acquires.

Under the terms of section 19, chapter 63, of the General Statutes of 1865, when any property owner has paid the tax assessed against his property for the county's subscription to the railroad stock, he is entitled to a certificate from the county court to that effect, which certificate is transferable, and when one obtains sufficient of such certificates to equal in amount the face value of a share of stock, he is entitled to present them to the railroad company, and have a share of the county's stock transferred to him, and so on until all the

county's stock is taken up by those who pay the tax. When the railroad company pays its tax it also is entitled to such a certificate, which it may either sell or keep until it has accumulated enough to equal in amount a share, and then have a share of the county's stock transferred to it. A corporation may purchase or acquire by surrender shares of its own stock, ¹⁷⁰ to be reissued, sold, or retired, as the case may be: *Cook on Corporations*, 4th ed., secs. 29, 311; *Johnson v. Lullman*, 15 Mo. App. 55; affirmed, 88 Mo. 567; *Hill v. Atoka Coal Co.*, 124 Mo. 153. Thus, for every hundred dollars of tax the railroad company pays toward this subscription, if that be the par value of the stock, it is entitled to a share of same. If, therefore, the total amount the county pays for all the stock is diminished by what the railroad company contributes, the total amount of stock it receives for the use of its taxpayers other than the railroad company is diminished to the same degree. There was a clause in that section to the effect that individual subscribers to the stock should be credited on their railroad tax lists with the amounts paid by them on their own subscriptions, which clause, if it had been suffered to go into effect, would have resulted in depriving the railroad company to that extent of the benefit of the county's subscription. But this court in 1885 held that clause to be unconstitutional, and that unjust feature was removed: *Cock v. Stewart*, 85 Mo. 575. As between the original railroad company and the county of Schuyler, the county has paid with its bonds the full price of the stock, and therefore the taxpayers are entitled to a transfer of certificates of stock as they pay their taxes: *Spurlock v. Pacific R. R.*, 61 Mo. 319.

The theory of the law is that the stock is the equivalent for the price paid or agreed to be paid for it; that is the consideration that supports the contract, and that consideration will continue to support it even though the stock may have depreciated to little or no value. The sale of the property of the Missouri, Iowa, and Nebraska Railroad Company under foreclosure of its mortgage in 1886 and the purchase of the same by the defendant company may have had a very depressing influence in the market on the value of the stock in the first-named company, but that does not affect the validity of the contract of subscription or the rights of the taxpayers growing out of it. The old company had the right under ¹⁷¹ the original contract of subscription, on payment of its tax to the amount of the face value of a share of its stock, to have a share

of the company's stock transferred to it. When that contract was made it was perhaps contemplated that that stock would be worth its face or more, and if it had been so the company would have been entitled to the advantage. The present company stands in that respect in the shoes of the old; it takes the property subject to the tax, and has the right to demand a transfer of the county's shares in the old company when it accumulates certificates showing a payment of taxes in sufficient quantity. The stock may not be as valuable now as it was at one time hoped it would be, but that does not affect the contract.

We hold, therefore, that under the constitution and statutes of this state in force in 1871 when the county subscribed to the capital stock of the Missouri, Iowa, and Nebraska Railroad Company, the property of the company in the county, including that which the county's subscription helped to create or construct, which was subject to taxation for general county purposes, was subject also to taxation to pay that subscription. Having reached this conclusion upon the premises laid down by appellant, it will be unnecessary to follow the counsel for respondent in their able argument, based on the decision of the supreme court of the United States in *Keokuk etc. R. R. Co. v. Missouri*, 152 U. S. 301, relating to the effect to be given to the consolidation of the Alexandria and Nebraska with the Iowa Northwestern Railroad Company.

The judgment of the circuit court is affirmed.

All concur, except Sherwood, J., who is absent.

A RAILROAD CANNOT BE TAXED to raise funds to pay the amount of a county's subscription to aid in building the road: *Applegate v. Ernst*, 3 Bush, 648, 96 Am. Dec. 272.

BROYLES v. COX.

[153 Missouri, 242.]

HOMESTEADS—HEAD OF FAMILY.—An unmarried man living on his own land with his mother, sisters, and brother, in his own house and contributing to their support, is the head of the family, and entitled to a homestead.

HOMESTEADS—LIABILITY FOR DEBTS—SALE AFTER DEATH OF HOMESTEAD CLAIMANT.—A homestead is not liable for a debt contracted after its inception and during its continuance, nor can it be sold after the death of the homestead debtor to pay such debt, subject to the occupancy thereof of the widow during her life and of his children during their minority.

Martin & Woolfolk, for the appellant.

Norton, Avery & Young, for the respondents.

244 MARSHALL, J. William S. Cox died in Lincoln county in August, 1896, leaving personal property of the value of two hundred and ninety-two dollars, and fifty-eight acres of real estate of the value of thirteen hundred and sixteen dollars and twenty-six cents, which being duly appraised by appraisers appointed by the probate court, as of the value stated, was, by order of that court, turned over to his widow, the defendant, Emma Cox, as her absolute property, and letters of administration refused "unless on application of creditors or other persons interested the existence of further or other property be shown."

Thereafter, in 1897, the plaintiff applied to the probate court for an order granting letters of administration on said estate, alleging that he was a creditor thereof. On a hearing that court granted the application, "holding that the fee in the **245** homestead of the widow is subject to the payment of debts contracted prior to the amendment of the homestead act by the legislature in 1895." Emma Cox, the defendant, appealed to the circuit court, and that court held that William S. Cox, "at his death or since, owned no property subject to administration," and ordered that no administration be had upon his estate. From this judgment the plaintiff appealed to this court.

The land in controversy was a part of the estate left by the father of William S. Cox at his death, some time prior to 1861, and was the portion of the father's estate which was set off to W. S. Cox by the voluntary partition between the heirs in

1878. At that time W. S. Cox was unmarried and lived on this land, and his mother and two unmarried sisters and a brother lived with him on the land, and continued so to do until the death of the mother in February, 1883, the marriage of one of the sisters just after her mother's death, and the death of the other sister, shortly afterward. Thereafter, for eighteen months, W. S. Cox lived on the place alone, until he married, and thenceforward he continued to live on it with his family as his homestead until his death in 1896, and his widow and four children have lived on it ever since. A "Mr." Smith, witness for plaintiff, testified that while W. S. Cox and his mother, sisters, and brothers lived on the land he did not know who supported the family, but that "Sumner" (W. S. Cox) "said they all contracted their own debts and settled them when he and the boys and the old lady lived there; the old lady paid her debts; each was living independent of the other."

Columbus Cox, one of the brothers of W. S. Cox, also a witness for plaintiff, who was the administrator of the mother's estate, testified that the mother left a horse, some cattle, and "a few things around the house," which W. S. Cox bought at the administrator's sale; that at the time his mother died "Sumner and two sisters were living there then. They all lived off of the place. Sumner cultivated the farm then. After the ²⁴⁶ division and Sumner got his piece of land, he and the two girls lived on it with mother until her death in 1883. One of the girls married just after mother's death. Sumner kept back about eighteen months before he was married in 1884. After he married he lived on the place until he died last year. He left a wife and four children. . . . Sumner and the girls kept house; mother helped along; she attended to the housekeeping; the bills were all run together and all paid together. We all worked and made the money."

This same witness further testified as follows: "Q. Your mother and sisters and you would contract your own bills and pay your own debts? A. No, sir. Q. Did your brother pay any bills for your mother? A. The way that was done, the bill was all run together, everything they bought. Q. All pay together? A. Yes, sir; everything was carried on in his name, and he done the paying. Q. Each of you contributed your part? A. We worked and made the money. Q. He done it? A. He was the head of the family. Q. The old lady paid her bills, too? A. No, sir; that's the way it was paid. Of course,

they raised chickens. Q. Your mother did not contract any store bills in her own name? A. No, sir."

Fred Cox, a brother of the deceased and a witness for defendants, testified: "Sumner was the head of the family, and supported the family; after mother's death he remained there; sisters lived with him a month after; Sumner lived there alone eighteen months and then married and lived there until he died. Left his wife and four children; they are occupying the premises. . . . Sumner provided everything and supported the family. When I lived there the boys all worked together and supported the family."

The plaintiff holds a note made by W. S. Cox, dated March 16, 1883, for one hundred and fifty dollars, payable one day after date, with interest at the rate of ten per cent per annum, compounded ²⁴⁷ annually, on which there is a credit of fifty dollars, March 1, 1886, and one hundred dollars, November 26, 1887.

No declarations of law were asked or given. Appellant here asserts two propositions of law: 1. That W. S. Cox was not entitled to a homestead in the land, because he was not the head of a family or a housekeeper at the time the land was acquired, in 1878, or at the time the debt to plaintiff was contracted, in 1883; and 2. That if Cox was entitled to a homestead at all it was under the act of 1875 (Laws 1875, p. 60), which at his death became assets of his estate and liable to sale, subject to the life use of the widow and the minor children until their majority, and the plaintiff, as his creditor, has an interest in the homestead, and that the homestead act of 1895 (Laws 1895, p. 186), so far as it operates upon debts in existence at that time, "violates the constitution prohibiting the enactment of laws impairing the obligation of a contract," both of which propositions were called to the attention of the trial court in the motion for a new trial.

This being a proceeding at law, and no declarations of law being asked or given by the trial court, and the facts not being agreed upon or the evidence wholly documentary, we might content ourselves with merely affirming the judgment below for this reason (*Sieferer v. St. Louis*, 141 Mo. 592), but as there is no substantial conflict in the evidence as to the facts, it presents, practically, a simple question of law, and we shall so treat it.

From 1878 to February, 1883, when his mother died, William S. Cox owned the land in question. His mother, two sisters,

and at least one brother lived with him on the land. They all worked, in one capacity or another, much as the members of a man's family living in the country usually do. Both of his brothers, one a witness for and the other against his widow and children, testify that he was the head of the family; that all the bills were made in his name, but ²⁴⁸ that all the relatives worked to help make the money that paid the bills. As against this testimony is that of Mr. Smith, a neighbor of deceased, who testified on behalf of the plaintiff that he did not know who supported the family, but that Sumner (the deceased) said they all contracted their own debts and settled them, each living independent of the other. As Cox was dead, of course this could not be contradicted. But the fact remains that they all lived on Cox's land and in his house, and to this extent, at least, he contributed to the support of his mother and sisters and brothers, and was therefore a housekeeper or the head of a family within the meaning of the statute: *Finnegan v. Prindeville*, 83 Mo. 517. It is not essential that a man shall be a married man to be the head of a family; it is enough to satisfy the statute if he contributes in part to the support of those who have a moral, though not a legal, claim upon him: *State v. Kane*, 42 Mo. App. 253; *Wade v. Jones*, 20 Mo. 75, 61 Am. Dec. 584; *Duncan v. Frank*, 8 Mo. App. 286. A married man is the head of a family even when his wife has left him and he has no children: *Brown v. Brown*, 68 Mo. 388; *Whitehead v. Tapp*, 69 Mo. 415. So, too, if he lives on the land with his two children, who are of age and work for him without wages and look up to him as such: *Bank of Versailles v. Guthrey*, 127 Mo. 189, 48 Am. St. Rep. 621. It is sufficient if he "controls, supervises, and manages the affairs about the house," and it is not necessary that he shall be "a father or a husband": *Ridenour-Baker Grocery Co. v. Monroe*, 142 Mo. 170.

Under this rule and these facts it is too clear for dispute that William S. Cox became the head of a family in 1878 (*Finnegan v. Prindeville*, 83 Mo. 517), and continued so to be thereafter until the time of his death, and was such at the time he contracted the debt to plaintiff in March, 1883: *Beckmann v. Meyer*, 75 Mo. 333. Being the head of a family and the owner and occupant of the land as a homestead long prior to contracting the debt, the plaintiff acquired no ²⁴⁹ interest in the land or right to look to it as security for his money when the loan was made, or to have it sold subject to the homestead rights of his widow and children: *Bank of Versailles v. Guth-*

rey, 127 Mo. 189, 48 Am. St. Rep. 621, which case overrules, expressly, Schaffer v. Beldameier, 107 Mo. 314, and Miller v. Leeper, 120 Mo. 466.

Of course, a homestead is not exempt as against debts existing at the time it is acquired: State v. Diveling, 66 Mo. 375; Buck v. Ashbrook, 59 Mo. 200; Stivers v. Horne, 62 Mo. 473; Berry v. Ewing, 91 Mo. 395. But in this case the debt to the plaintiff was not created until March, 1883, and the homestead had been acquired and established in 1878 and kept up continuously thereafter until his death in 1896. So that this is an after-created debt, for the payment of which the homestead was not subject to levy, attachment, or sale during his lifetime and in which the plaintiff creditor had no interest, but which the testator might have sold during his life and a perfect title would have passed to the purchaser so far as any right of his creditors was concerned.

The point of plaintiff's contention, however, is that under the act of 1875 the homestead, upon the death of the head of the family passed to the widow and children, "without being subject to the payment of the debts of the deceased, unless legally charged thereon in his lifetime, until the youngest child shall attain its legal majority and until the death of such widow, and such homestead shall, upon the death of such housekeeper or head of a family, be limited to that period. But all the right, title, and interest of the deceased housekeeper or head of a family in the premises, except the estate of the homestead thus continued, shall be subject to the laws relating to devise, descent, dower, partition, and sale for the payment of debts against the estate of the deceased," etc., whereas by the act of 1895 the homestead, upon the death of the head of a family, passed to the widow and children, "and shall continue for their benefit without being subject ²⁵⁰ to the payment of the debts of the deceased, unless legally charged thereon in his lifetime, until the youngest child shall attain its legal majority and until the death of such widow; that is to say, the children shall have the joint right of occupation with the widow until they shall arrive respectively at their majority, and the widow shall have the right to occupy such homestead during her life or widowhood, and upon her death or remarriage it shall pass to the heirs of the husband," etc., and it is claimed that the act of 1895 takes away the right which a creditor has under the act of 1875 to sell the homestead during the life of the widow or minority of the children, subject to the homestead

rights of the widow and children, and hence a vested right in a remedy to collect the debt, which was as much a part of the contract as the debt itself, was taken away, and the obligation of the contract was thus impaired.

This contention is untenable. This court held that under the act of 1875 the property could not be sold for the payment of debts during the life of the head of a family subject to such homestead right, and that such attempted sale passed no title to the purchaser: *Bank of Versailles v. Guthrey*, 127 Mo. 189, 48 Am. St. Rep. 621; *Macke v. Byrd*, 131 Mo. 682, 52 Am. St. Rep. 649; *Ratliff v. Graves*, 132 Mo. 76. The same principle forbids the sale thereof during the life of the widow or the minority of the children. It has also been held that during the last-named period the homestead cannot be partitioned under the act of 1875: *Rhorer v. Brockhage*, 86 Mo. 544; *Hufschmidt v. Gross*, 112 Mo. 660. No distinction was made in the act of 1875 between a partition and a sale for the payment of debts during the extended continuance of the homestead rights in the widow and children, and the same reason which forbids the one likewise prohibits the other.

In *Skouten v. Wood*, 57 Mo. 380, it was held that, under the homestead law of 1865, the widow took a fee simple absolute in the homestead, subject to the homestead rights of the ²⁵¹ children, and that on her death the estate would go to her heirs to the exclusion of his heirs. In this holding the decisions of the supreme court of Vermont, from which state our statutes were taken, were followed. But since the passage of the act of 1875 providing that, subject to the homestead rights of the widow and children, the homestead should be subject to the laws of devise and descent, it has been held the widow takes a life estate in the homestead, the children have an estate in the use during their minority, and after the widow's death and the children's majority the estate passes to the heirs of the husband: *Hufschmidt v. Gross*, 112 Mo. 657. And this is, practically, the change which the act of 1895 makes in the act of 1875, for whilst the act of 1875 provides expressly that subject to the homestead rights of the widow and children the property should be subject to the laws of devise, descent, dower, partition, and sale for the payment of debts against the estate of the deceased, and whilst this provision is omitted from the act of 1895, and instead thereof it is provided that upon the death or remarriage of the widow, and upon the youngest child attaining its majority, the property shall pass to the heirs of

the husband, the result is the same under both acts, as under neither could the property be sold for the debts of the deceased or partitioned during the continuance of the extended homestead rights, and under both it would, at the termination of the extended homestead rights, become assets descended from the ancestor to his heirs, which would be subject to the payment, at the expiration of such time, of his debts.

The construction placed upon the act of 1875 was as much a part of plaintiff's contract as any other part of it, and as under that construction of the act of 1875 he had no vested right in the remedy to sell the homestead for the payment of the debts of the husband during the life of the widow or the minority of the children, and as the act of 1895 was to the same effect, it follows that the act of 1895 took away ²²³ no rights or remedies which the plaintiff had when the contract was made, and hence that such act—of 1895—does not violate the constitutional inhibition against the passage of laws impairing the obligation of a contract.

The judgment of the circuit court was right and it is affirmed.

All concur.

HOMESTEAD—HEAD OF FAMILY.—An unmarried man whose indigent mother and sisters live with, and are supported by, him is the head of a family, within the meaning of homestead laws: See the monographic note to *Wike v. Garner*, 70 Am. St. Rep. 109, on who is the head of a family.

HOMESTEAD, WHEN TERMINATES.—As against creditors, a homestead held by a widow in her deceased husband's estate does not expire until her death: *Holloway v. Holloway*, 86 Ga. 576, 22 Am. St. Rep. 484; and an order of a probate court directing the sale of the homestead of a decedent is void, if made during the minority of his children, or while his widow is unmarried and has not abandoned the homestead nor acquired any other in her own right: *Bond v. Montgomery*, 56 Ark. 563, 35 Am. St. Rep. 119.

GRATTIS v. KANSAS CITY, PITTSBURG, AND GULF RAILROAD COMPANY.

[153 Missouri, 380.]

MASTER AND SERVANT—VICE-PRINCIPALS.—Whether an employé is a vice-principal depends upon his authority to represent the master.

MASTER AND SERVANT—FELLOW-SERVANTS.—The conductor, engineer, and fireman on the same railroad train are fellow-servants.

MASTER AND SERVANT—FELLOW-SERVANTS—LIABILITY FOR INJURY TO.—The conductor, engineer, and fireman on the same train are fellow-servants, and in case of injury to a fireman caused by an open switch, and the failure of the engineer to observe the rules of the railroad company and stop his train after express notice from the fireman of the danger, the fireman cannot recover from the company for his injury, in the absence of proof of the incompetency of the engineer, although the fireman was helpless to stop the train. He assumed the risk when he entered the employment.

MASTER AND SERVANT—FELLOW-SERVANTS—LIABILITY FOR INJURY TO.—The conductor, engineer, and fireman on a railroad train are fellow-servants, and, in case of injury to a fireman caused by an open switch, and the failure of the engineer to stop, the conductor's signal to the engineer to go ahead just before the accident does not have the effect of suspending or waiving the rules of the company requiring all trainmen to observe targets and danger signals at switches, and in case of doubt to stop, so as to make the company liable for the injury to the fireman.

MASTER AND SERVANT—SAFE MACHINERY.—The master cannot be deemed guilty of negligence if he furnishes his servant with machinery and appliances reasonably safe when used in the manner they are intended to be used, but which may become dangerous if their use is perverted by the servant.

Trimble & Braley, Benton & Sturgis, and J. A. Eaton, for the appellant.

Cravens & Cravens and E. H. Stiles, for the respondent.

²⁸⁵ **MARSHALL, J.** The following opinion of Division No. One is hereby adopted as the opinion of the court in Bank.

Gantt, C. J., Sherwood and Valliant, JJ., concur.

Burgess and Robinson, JJ., concur in the judgment of reversal, on the ground that the negligence of the engineer was the cause of the injury, and that the engineer and fireman were ²⁸⁶ fellow-servants, but do not regard the "departmental doctrine" as involved in the case.

Brace, J., dissents.

It is therefore ordered that the judgment of the circuit court be reversed.

IN DIVISION NO. ONE.

MARSHALL, J. This is an action for damages for personal injuries received by plaintiff at McElhaney switch, in Newton county, Missouri, between the hours of 1 and 2 o'clock P. M. on July 12, 1894. The petition charges that it was a switch station where trains stop only when signaled; that there is a sidetrack on the east side of the main track long enough to hold eleven standard freight stock-cars; that at each end of the sidetrack there was a switch post placed on the east side of the main track instead of the west side, each post being about six feet and four inches from the east rail of the main track and used to work the switch; that the switch posts have targets placed on their tops, one side being painted red and the other white, so that the color indicates whether the switch is thrown to connect with the switch or with the main track—the red signifying that the connection is with the switch and the white that it is with the main track, and that when the red appears it is dangerous for trains to attempt to pass over from the opposite direction; that on July 12, 1894, the switch or sidetrack was full of empty freight-cars, there being eleven standard freight-cars on it, which were put there by defendant on July 11, 1894, “making it impossible to see the target on the switch post at the south end of the switch track by those seated in engine cabs of trains moving south along said place until within sixty or eighty feet of said switch post; that the ties supporting the main track at the south end of the sidetrack were rotten and would not hold the spikes that were intended to hold the rails in place; that at the south end of the switch track” was what is known as “a ‘stub-rail’ switch, an old and abandoned and extremely dangerous and hazardous ³⁸⁷ character of switch, long since discarded by all practical railroad men, and especially dangerous and unsafe, under the circumstances, with the switch post and target on the east side of the main track; that the lock maintained on said switch was weak and old and insufficient to hold the same”; that plaintiff was employed as fireman on a train that was going from Pittsburg, Kansas, to Siloam, Arkansas, and when the train approached McElhaney flag station, going south, it was traveling at the rate of about fifteen miles an hour, and when it neared the south end of the switch it was discovered that the switch was thrown for the sidetrack, which left the end of the main track at the switch open to this train, going south; that this

could not have been discovered sooner because the cars on the sidetrack obstructed the view of the switch post and target from plaintiff and the engineer on the engine; that if the cars on the sidetrack had not obstructed the view or if the target had been on the west side of the track it could have been seen for a quarter of a mile before reaching the end of the switch; that as soon as plaintiff discovered that the switch was open he notified the engineer, who tried to stop the engine but could not do so in time, and the engine was thrown from the track, the rotten ties gave way, and the engine was thrown over on its side; that when plaintiff saw his imminent danger he jumped from the cab of the engine; that the engine was old, worn out and defective, and unfit for use, and the "pops," attached to the engine on the top of the steam dome, being defective and out of repair, flew out and the steam escaped and scalded and burned plaintiff over his whole body.

Plaintiff then sets out the negligence of the defendant to be "in permitting the empty cars to be and remain on the sidetrack or switch aforesaid, and thereby preventing plaintiff and said engineer [who was killed] from seeing the signal target of the switch, which would advise them of the danger on account of said switch or track being moved out of place; ³⁸⁸ in having said switch rods and targets on the east side of said main track instead of on the west, where it ought to have been for the appliance to be reasonably safe, and where proper and ordinary railroading required them to be placed, and where a person in the exercise of ordinary care and foresight would in view of the great danger involved have placed them; in having at that place an unsuitable and unsafe 'stub-rail' switch instead of a 'split' or 'spring' switch, which latter are entirely free from the danger which produced this accident, and which ordinary care and foresight on the part of the defendant would have caused it to provide; in permitting said engine to be out of repair, and said 'pops' to be and remain loose, out of repair, and unsafe and in a dangerous condition as above stated; in having on said switch post an unsuitable and unsafe lock."

The answer admitted defendants' incorporation and ownership of the road, and also the allegations as to the character, purpose, and working of the switch, and denied the other allegations of the petition. It then pleaded contributory negligence of plaintiff and the engineer, and averred that it was the duty of the plaintiff and the engineer to see that the switch was correctly set and the track clear before attempting to pass

over it, and that they failed to exercise ordinary care in not stopping the engine where the cars on the sidetrack obstructed the view of the target until they could ascertain whether the track was safe to pass over; that plaintiff knew the character of the switch and the condition of the engine, and that notwithstanding they ran the train over the switch at a high rate of speed and caused the accident; that plaintiff and the engineer were in possession of the rules of the company defining and prescribing their duties, one of which—No. 65—was: "A signal imperfectly displayed, or the absence of a signal at a place where a signal is usually shown, must be regarded as a danger signal." Another—No. 78—was: "All signals must be used ~~see~~ strictly in accordance with the rules, and trainmen and engineers must keep a constant lookout for signals." Another—No. 121—was: "In all cases of doubt or uncertainty, take the safe course and run no risks." That plaintiff and the engineer violated said rules by not stopping the train when they could not see the signals.

The reply was a general denial, but during the trial it was amended so as to allege that when the train approached McElhaney station, it slowed up with the intention of stopping there and at a point a short distance north of the end of the switch, and had almost stopped, when the conductor ordered the engineer not to stop, but to go on, which was done against plaintiff's protest, and he was powerless to prevent it or otherwise protect himself.

The trial disclosed the facts to be that the plaintiff, about June 1, 1894, began to run as a fireman on the local freight train between Pittsburg, Kansas, and Siloam Springs, Arkansas, and with the exception of a few days made daily trips, and in doing so passed this switch every day. The train crew on the day of the accident were Jay Traver, engineer, George Bartholic, conductor, J. A. Cellar, brakeman, and plaintiff, fireman. There were two local freight trains running daily, one each way, between Pittsburg and Siloam. They usually met at Donahue, a station four miles north of McElhaney switch. On this day the south-bound train, on which plaintiff was fireman, was late, and hence the freight train met at Neosho, between 12 and 1 o'clock P. M. The accident occurred between 1 and 2 P. M. The running time between Neosho and McElhaney was fifteen or twenty minutes, so that the north-bound freight passed safely over the switch in question about thirty to forty minutes before the accident. The defendant

had only acquired the portion of the road between Joplin, Missouri, and Sulphur Springs in May, 1894, and had therefore only been operating it from May to July 12th, when the accident occurred.

300 At McElhaney station there was a switch or sidetrack, on the east side of the main track. At each end of the switch or siding there were "clearance posts"—that is, posts to designate the limits that trains might occupy on the switch and the distance they must be kept from the main track. These clearance posts were four hundred and twenty-nine feet apart. On the day of the accident the switch was full of freight-cars. At both ends of the sidetrack there were switch stands, of the character known as "stub-switches," that is, with blunt ends of the rails coming together, so that when the switch was opened a train coming from the south would run on the sidetrack, but a train coming from the north would be derailed. One of the claims made by the plaintiff is that a stub-switch is dangerous, not to the train coming from the south, for as to it the only result would be to throw the train from the main track onto the switch or sidetrack, but to the train coming from the north, for as to it the result would certainly be to derail the train; hence plaintiff claims that a "split-switch" or a "split-spring switch" should have been used, by which is meant a rail beveled on one side and coming almost to a knife edge at the end, so that it rests against the rails of the main track and changes the points of the switch from the main to the side track, and does not destroy or break the continuity of the main track, and that if such a switch had been used, a train coming from the north would not have been derailed, but the flanges of the wheels would simply have forced the switch back and let the train pass through the switch along the continuous rails of the main track, and if it was a split-spring switch, it would have sprung back into place after the train passed through it.

When the train approached McElhaney the engineer brought it almost to a stop at a point eighty rods north of the north end of the switch. At this point the plaintiff notified the engineer that the sidetrack was full of cars and that he could not see the target of the switch at the south end of the sidetrack. The engineer said: "I am going; I have a signal 301 from the conductor to go on." Again plaintiff told the engineer he could not see the target, but the engineer replied: "I have a signal from the conductor and things are apparently all right, and I am going." The engineer proceeded, increas-

ing speed the while, and when the train neared the switch at the south end of the sidetrack the plaintiff notified the engineer that the switch was open. The engineer tried to stop the train, but did not succeed, and it ran off the track, turned over, the "pops" were broken, the steam escaped, and scalded and burned plaintiff most seriously. The court gave the jury twelve instructions at the request of the plaintiff, fifteen of the court's own motion and four asked by defendant. There was a verdict for the plaintiff for six thousand dollars, and defendant appealed.

1. The case was tried below on the theory that the conductor was a vice-principal, and that his orders to the engineer to go ahead overcame the rules as to signals, unless the danger was so apparent and imminent as to deter a person of ordinary prudence from proceeding, and if the plaintiff, as fireman, was under the control and subject to the orders of the engineer, and had no control over the engine, and if plaintiff notified the engineer that the switch target was obscured by the cars standing on the sidetrack, and notwithstanding the engineer went ahead, "then the acts of the said engineer in so doing should not be regarded as the personal acts of plaintiff unless he concurred therein."

The controlling legal questions in the case therefore are:

1. Are the conductor, engineer, and fireman of a train fellow-servants, or is the conductor a vice-principal, and the engineer and fireman fellow-servants, or is the conductor a vice-principal, the engineer a lesser vice-principal, and the fireman the servant? and 2. Was the defendant negligent in not furnishing safe appliances and machinery—that is, in maintaining ³⁹² a stub-switch instead of putting in a split-switch or a split-spring switch? The leaky pops may be disregarded as they were not the proximate cause of the injury. Likewise the allegations as to the broken lock on the switch and the character of the ties may be eliminated, as they had nothing to do with the injury.

There is no branch of the law that has received more attention than that relating to master and servant, and there is none as to which a greater diversity of opinion has been expressed, and certainly none that is to-day more uncertain.

The old doctrine that all persons under the control and in the pay of a common master are fellow-servants and that the master is not liable to anyone for injuries received through the negligence of any of the others has been relaxed, modified, dis-

tinguished, and pared down, and with the characteristic ingenuity and inventiveness of the age, distinctions have been drawn, the first relation has been extended many degrees, and the original classification has been many times subdivided, with the result that much contrariety of opinion exists, and the whole matter is unsettled and left in an unsatisfactory state. By some this has been called the evolution of the law from its original harshness to a more humane condition. By others it is placed upon the ground of necessity—that is, that where the master has a small business and only a few servants under his own eye and personal supervision, and where all of the servants are “Jacks of all Trades” in respect to the master’s business, each doing any part of the whole as he may be directed, they are fellow-servants, and have no recourse against the master for injuries received through the negligence of the others, but where the master’s business increases and becomes more extended, and spreads out into many places, and, perhaps over many states, so that the master cannot be always present in person to direct or to hear reports from his servants, it is, of course, necessary for him to have some one on the spot to represent him, an alter ego ³⁹³ or vice-principal it is called, who shall have the right to speak for the master, and in such cases such person’s acts are the acts of the master, and he is liable to the servant for injuries received through his negligence, the same as if the master had been present, acting himself.

No serious objection can be raised to this rule in the abstract, for a master choosing to have a scattered or diversified business which he cannot personally look after must needs have a representative on the ground, and hence, taking the benefits of such an extended business, he must bear the burdens necessarily incident to its transaction. At first a vice-principal was limited to be a person who had the right to employ and discharge the servants, but this has since been relaxed; and the rule now is that it is a question of authority to represent the master which determines the question of whether a person is a vice-principal. The courts have often been asked to lay down a definite principle or rule for the determination of the question, but as was well said by Gantt, J., in *Parker v. Hannibal etc. R. R. Co.*, 109 Mo. 378: “After a careful examination of this subject in its varied aspects, we think the attempt would be futile and unsatisfactory. The judge or court who would deal in general observations outside of the record under con-

sideration would be treading on dangerous ground, and in a very short time would probably find 'himself hoisted by his own petard.' . . . And after due consideration we are of the opinion that, unsatisfactory as it may seem, the rule itself must remain general, its application specific, as the cases arise. This rule, to exempt the master, requires the servants shall be employed by a common master, and the servants must be employed in the same common employment." Accordingly, in that case it was held that a sectionhand engaged in repairing the track was a fellow-servant with the engineer and crew running a construction train that was hauling rock to be used in ballasting the track.

*** Some courts have undertaken to lay down a rule broad and just and elastic enough to cover all cases, unmindful, it seems to me, of the fact that in so doing they are wiping out the old rule as it was at common law, and substituting a new rule of their own creation, which the changing conditions of life may shortly prove as unacceptable to their successors as the rules of the common law are to them. In the attempt, however, they have classified the service of the master, divided it into departments of service, and say that a servant shall be barred of recovery only where the injury was received through the negligence of a fellow-servant in the same department of service, and shall not be cut off where it came about through the negligence of a servant in another department. The reason given for this is that: "Where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends, to a great extent, on the care and skill with which each shall perform his appropriate duty, each is an observer of the conduct of the other, can give notice of any misconduct, incapacity, or neglect of duty, and leave the service if the common employer will not take such precautions and employ such agents as the safety of the whole party may require." Yet in the practical application of the departmental doctrine to the specific cases that have arisen, as much difficulty has been encountered as was found before, and different courts have disagreed as widely on the same state of facts as was the case before the introduction into the law of the new rule. In fact, the reported cases show that the decisions of the same court cannot be made to harmonize under the principles announced in the new rule. This is partly explainable from the fact that the same person in the same department may occupy the relation of vice-principal and fellow-servant at the same

time or may be the one to-day and the other to-morrow. Even in the same department there may be several distinct gangs of servants, each having its own foreman or vice-principal, and neither in a position to observe the conduct and give the notice of misconduct, ²⁹⁵ incapacity, or neglect of duty in the other, yet under the departmental doctrine the servants in each are the fellow-servants of those in the other gang.

The practical difficulty in trying to enforce the departmental doctrine is that it is nowhere stated of what the departments shall be composed. The term or name is employed as expressive of a class, but there has been no attempt to classify. The result is contrary judgments upon the same facts, an irreconcilable contrariety of opinion, with a natural and to-be-expected confusion in the law, with no better or more satisfactory results to either the master or servant than were attained before the doctrine was announced. A brief review of the decisions in our state will suffice to illustrate.

McDermott v. Pacific R. R. Co., 30 Mo. 115, was the first case in which the doctrine of fellow-servant was discussed. It was a suit by a brakeman who was injured by the Gasconade bridge disaster in 1860. Napton, J., held there could be no recovery, as the brakeman and bridge-builders were fellow-servants, and that the rule "applied in all cases alike, without regard to the degrees of subordination in which the different servants or agents may be placed with reference to each other," citing with approval Farwell v. Boston etc. R. R. Corp., 4 Met. 49, 38 Am. Dec. 339. Wagner, J., in Rohback v. Pacific R. R., 43 Mo. 187, held a track repairer and a trainman were fellow-servants. In Moore v. Wabash etc. Ry. Co., 85 Mo. 588, Henry, J., held that a car repairer and the crew of the engine that ran into the car the repairer was working on were not fellow-servants, and allowed a recovery to stand on the ground that the company was obliged to provide for the safety of the servant, and the foreman of the repair shop had promised the repairer to see to it that no engine should run into the car which was standing on the sidetrack and which he was repairing. In McGowan v. St. Louis etc. R. R. Co., 61 Mo. 528, Hough, J., held that a conductor and a laborer engaged in loading bridge timbers on the train were fellow-servants. In Smith v. Wabash etc. Ry. Co., 92 Mo. 359, 1 Am. St. Rep. 729, Norton, J., held that a train ²⁹⁶ dispatcher and the conductor, engineer, and fireman of a train are not fellow-servants. In Sherrin v. St. Joseph etc. Ry. Co., 103 Mo. 378, 23 Am. St. Rep. 881, Ganjt,

P. J., held that the two foremen of two different gangs of sectionmen working independently of each other, but under the same roadmaster, are fellow-servants. In *Sullivan v. Missouri etc. Ry. Co.*, 97 Mo. 113, Black, J., held that a track-walker is not a fellow-servant with an engineer or fireman of a passenger train. In *Murray v. St. Louis Cable etc. Ry. Co.*, 98 Mo. 573, 14 Am. St. Rep. 661, Black, J., held that the gripman and a watchman at a street crossing, whose duty it was to signal the cars to stop or go ahead, were fellow-servants, because engaged in the same common employment of running the cars. In *Higgins v. Missouri etc. Ry. Co.*, 104 Mo. 413, Gantt, P. J., held that an engineer and laborer on a construction train were fellow-servants. In *Parker v. Hannibal etc. R. R. Co.*, 109 Mo. 362, Gantt, P. J., held that a track repairer and the engineer of a construction train were fellow-servants. In *Dixon v. Chicago etc. R. R. Co.*, 109 Mo. 413, Barclay, J., held that a laborer whose duty was to couple small cars used to haul rock up an incline across the track, the rock to be crushed and used as ballast for the road, was not a fellow-servant with the engineer of a passenger train. In *Tabler v. Hannibal etc. R. R. Co.*, 93 Mo. 79, Black, J., held that a master mechanic and wreck-master was not a fellow-servant of a bridge carpenter. In *Miller v. Missouri etc. Ry. Co.*, 109 Mo. 350, 32 Am. St. Rep. 673, Black, J., held that a conductor of a material train, having control of it and its movements, and the foreman over a crew engaged in repairing a railroad track, having power to direct them, are vice-principals, and the defendant is liable for the death of a member of the crew occasioned by their negligence. In *Relyea v. Kansas City etc. R. R. Co.*, 112 Mo. 86, Black, J., held that a brakeman on one freight train and a fireman on another, where they are engaged in the same department of service and are operating trains over the same section of the road, are fellow-servants. The learned judge further laid down the departmental doctrine as follows: "They are coservants who are so related and associated in their ³⁰⁷ work that they can observe and have an influence over each other's conduct and report delinquencies to a common correcting power; and they are not coservants who are engaged in different and distinct departments of work"; and further said: "Now, in this case each servant was under the immediate command of his own conductor, it is true; but that fact does not constitute a decisive or controlling circumstance. Many cases

may be instanced where different gangs of men, each gang under the orders of its own foreman, are clearly coservants within the rule of exemption."

In *Schlereth v. Missouri etc. Ry. Co.*, 115 Mo. 87, Burgess, J., held that a locomotive engineer and track repairer are not fellow-servants. In this case Macfarlane, J., wrote the opinion of the court in Division No. Two, and said: "It is insisted, in the first place, that the demurrer to the evidence should have been sustained for the reason, as is claimed, that deceased and the negligent engineer were fellow-servants within the rule which exempts the master from liability for damages to one servant resulting from the negligence of the other. There is no doubt that the weight of judicial authority sustains the position for which defendant contends: *Murray v. St. Louis Cable etc. Ry. Co.*, 98 Mo. 573, 14 Am. St. Rep. 661. The majority of the members of this court are of the opinion, however, that the reasons and policy upon which the rule of exemption has been placed do not extend to those common employes of a railroad corporation occupying the relation to each other sustained by deceased and the engineer. The writer has been of the opinion that the general rule exempting the common master in all cases where the servants are engaged in a common service has been recognized and approved by the courts of this state for so long a period of time, without change or serious question, that while the principle has been questioned it has become the settled policy of the state, and should only have been changed by legislative action: *Rohback v. Pacific R. R.*, 43 Mo. 192, and cases cited in dissenting opinion of Gantt, J., in *Parker v. Hannibal etc. R. R. Co.*, ³²⁸ 109 Mo. 362. The importance of having the rules of law firmly established, especially those under which property rights are held, or the business and wages of large classes of citizens are made to depend is fully recognized, and we therefore hold in accordance with the late rulings of the court that the husband of plaintiff was not a fellow-servant of the negligent engineer: *Sullivan v. Missouri etc. Ry. Co.*, 97 Mo. 113; *Parker v. Hannibal etc. R. R. Co.*, 109 Mo. 362." A motion for rehearing was filed, and by reason of a division of the court the case was sent to the court in Bank for review. Burgess, J., wrote the opinion in Bank, and held that on the faith of *Sullivan v. Missouri etc. Ry. Co.*, 97 Mo. 113, *Parker v. Hannibal etc. R. R. Co.*, 109 Mo. 362, and *Dixon v. Chicago etc. R. R. Co.*, 109 Mo. 413, the

deceased and the engineer were not fellow-servants, because they were not in the same departments of service.

In this connection it is well to note that in the *Parker case* Gantt, Sherwood, and Macfarlane, JJ., held that the section-hand and the engineer of the construction train were fellow-servants, and hence they voted to reverse the judgment in plaintiff's favor, while Black, J., held they were prima facie fellow-servants, but that it might be rebutted by plaintiff, and so voted to reverse and remand, and Thomas, Brace, and Barclay, JJ., were of opinion that they were not fellow-servants, while in *Dixon v. Chicago etc. R. R. Co.*, 109 Mo. 413, Black, Brace, Barclay, and Thomas, JJ., held that the laborer and the engineer were not fellow-servants, and Sherwood and Gantt, JJ., held they were, and Macfarlane, J., having been of counsel, did not sit.

In *Swadley v. Missouri etc. Ry. Co.*, 118 Mo. 268, 40 Am. St. Rep. 366, Black, P. J., held that a track repairer was not a fellow-servant with the train crew of a regular freight or passenger train, and distinguished the case from *Parker v. Hannibal etc. R. R. Co.*, 109 Mo. 362, where it was a crew on a construction train and a track repairer. In *Rutledge v. Missouri etc. Ry. Co.*, 123 Mo. 121, Barclay, Black, and Brace, JJ., held a switchman and the engineer were fellow-servants. In *Jones v. St. Louis etc. Ry. Co.*, 125 Mo. 666, 46 Am. St. Rep. 514, Macfarlane, J., held that a porter in ³²⁰ a Pullman car is not a fellow-servant with the engineer and conductor. In *Keown v. St. Louis R. R. Co.*, 141 Mo. 86, Barclay, P. J., held that the foreman of a street-car line and a gripman on one of the cars were not fellow-servants. In *McCarty v. Rood Hotel Co.*, 144 Mo. 397, Sherwood, J., held the electrician and engineer in a hotel a fellow-servant with the elevator boy.

This is the state of the adjudications in our state, and similar conditions exist in other states where the departmental doctrine has been introduced into the decisions. Can any man, however learned in the law, however abstruse his analytical faculties, or however discriminating his logical powers, deduce any rule from these adjudications, or define the departments or classify or arrange the classes? Is the servant better protected or more humanely treated by this doctrine than he was before its adoption? Is the master's duty made plain, or the labors of the bar and the courts made lighter? In practical operation is it not true that these cases are, at last, decided according to their individual merits as they appeared from the facts

proved, and as the justice of each seemed to the judge deciding them to require when gauged by the old, tried, and accepted standards of the common law? Is it not a fact that the departmental doctrine exists only in theory and not in practice?

The only definite definition of a department that is attempted by any of them is by Black, J., in *Parker v. Hannibal etc. R. R. Co.*, 109 Mo. 362, when he puts clerks in the office in one department and servants operating a train in another. Yet in that same case it was held that a track repairer and the train crew of a construction train were fellow-servants, because in the same department, while in *Dixon v. Chicago etc. R. R. Co.*, 109 Mo. 413, which immediately follows *Parker v. Hannibal etc. R. R. Co.*, 109 Mo. 362, in the same volume of the reports, it was held that a laborer who attached the rope to a small car used to haul rock to a rock crusher and intended for ballasting the road was not a fellow-servant with the engineer of a ⁴⁰⁰ passenger train; and on the same line, in *Sullivan v. Missouri etc. Ry. Co.*, 97 Mo. 113, it was held that a track-walker and an engineer were not fellow-servants, yet in *Relyea v. Kansas City etc. R. R. Co.*, 112 Mo. 86, it was held that the brakeman on one freight train and a fireman on another were fellow-servants, and in *Schlereth v. Missouri etc. Ry. Co.*, 115 Mo. 87, it was held that an engineer on a passenger train and a track repairer were not fellow-servants, and in *Swadley v. Missouri etc. Ry. Co.*, 118 Mo. 268, 40 Am. St. Rep. 366, it was held that a track repairer and the train crew on either a freight or passenger train were not fellow-servants, while in *Rutledge v. Missouri etc. Ry. Co.*, 123 Mo. 121, a switchman and an engineer were held fellow-servants.

If it be said that these cases show the evolution of the law, how can *Relyea v. Missouri etc. Ry. Co.*, 112 Mo. 86, be reconciled with the departmental idea? The brakeman on the one train and the fireman on the other cannot observe the conduct of each other and give notice of "misconduct, incapacity, or neglect of duty." In short, it may be pertinently asked, What is the classification into departments of service which these cases create or authorize or recognize? Is it that clerks in the office constitute one department, train dispatchers another, the crew of a passenger train another, the crews of two freight trains another, the crew of a construction train and the track repairers another, the track-walkers a department unto themselves, the mechanics in the shops another, etc.? If so, are these all the departments, or, if not, what

others are there? Measured by experience and tested scientifically, if there is to be a division into departments, it should be: 1. The mechanical; 2. The operative; 3. The clerical; 4. The managerial; and 5. The executive. This would come nearer the natural and business division of work. The road could not be run without the engine and cars, the mechanical appliances; nor would the machines move without they were operated by human beings, nor could they move without tracks, and there could be no tracks without human beings to build them and keep them in repair; nor could the machines be built and the tracks ⁴⁰¹ laid and the cars be run without clerks to keep track of the business and attend to collecting the freight and passenger charges; nor could any of them be made to work harmoniously or successfully without managers; nor could the road be built or run or managed without the executive head that provided the finances in the first place, and provided for the regularly recurring operating expenses. Yet no court has divided the business into such departments or made any other division or classification. The adjudicated cases in our state, when brought into contraposition or conjunction, do not in the aggregate define the division into departments, but when any attempt is made to deduce a rule or create a class out of the several cases, discrepancies and inconsistencies are at once apparent. Still this court and the supreme courts of other states speak of departments of service, and yet in practice allow or deny recoveries which cannot be harmonized on the theory of departments of service. Practically, therefore, there is no difference between the old and the new rule. It leaves it where the old masters of the law put it—a mixed question of fact and law in every case. And so it should be.

The lower court in this case treated the conductor as a vice-principal, whose order to the engineer to go ahead amounted to a suspension of the rule which required the engineer to look out for the signals or targets, and also treated the engineer as a vice-principal, whose disregard of the warning of the plaintiff that he could not see the signal or target was the same as the negligence of the master, and because of his relation to the fireman held that they were not fellow-servants.

It is not denied that in so treating the conductor in his relations to the engineer and fireman the lower court followed the case of *Chicago etc. Ry. Co. v. Ross*, 112 U. S. 377, which

so holds, but in the light of subsequent decisions of that distinguished tribunal, the Ross case cannot now be considered the law in that court: *Baltimore etc. R. R. Co. v. Baugh*, 149 U. S. 402 368; *Northern etc. R. R. Co. v. Hambly*, 154 U. S. 349; *Central R. R. Co. v. Keegan*, 160 U. S. 259; *Northern etc. R. R. Co. v. Peterson*, 162 U. S. 346; *Oakes v. Mase*, 165 U. S. 363. In the last case cited that court held the engineer of one train to be a fellow-servant with the conductor of another. In our state, beginning with *McDermott v. Pacific R. R. Co.*, 30 Mo. 115, and running through *Rohback v. Pacific R. R.*, 43 Mo. 192, and *McGowan v. St. Louis etc. R. R. Co.*, 61 Mo. 528, the conductor, engineer, fireman, and brakeman have been held to be fellow-servants. If the departmental doctrine and the reasons given for it, to wit, opportunity to observe each other, notice and report incapacity or neglect, be followed, the result is the same and they must be held to be fellow-servants. Plaintiff, however, cites many cases in other jurisdictions which it is claimed hold that a conductor is a vice-principal and not a fellow-servant with the engineer, fireman, and brakeman, but an examination of them shows the point here involved was present only in the case of *Moon v. Richmond etc. R. R. Co.*, 78 Va. 745, 49 Am. Rep. 401 (and that case showed that the conductor had the power of placing and assigning to duty of the trainmen and the deceased was assigned to duty as a brakeman), and the case of *Cowles v. Richmond etc. R. R. Co.*, 84 N. C. 309, 37 Am. Rep. 620 (where it was held that one who is the engineer and conductor of a train is not a fellow-servant with the brakeman), and the case of *East Tennessee etc. R. R. Co. v. Collins*, 85 Tenn. 227 (where the engineer was held not to be a fellow-servant with a brakeman). Without further reference to other cases, then, it may be said, that prima facie, at least, the conductor, engineer, and fireman on the same train are fellow-servants. The engineer and fireman were held to be fellow-servants in *Baltimore etc. R. R. Co. v. Baugh*, 149 U. S. 368; and the engineer of one train and the conductor of another were held to be fellow-servants in *Oakes v. Mase*, 165 U. S. 363.

In this case the order to go ahead was given by the conductor, who was in the caboose at the rear of the train, eating his dinner, to the brakeman, who in turn signaled it to the engineer. Neither could see then or under usual circumstances ⁴⁰³ whether the track was clear or not. It was the especial duty of the engineer and fireman to watch the track

and see that no obstructions were in the way and to keep a sharp lookout for open switches: *Smith v. Missouri etc. R. R. Co.*, 113 Mo. 80. The conductor's signal or order to go ahead cannot have the effect of waiving or suspending the rule of the company, which the engineer and plaintiff well knew, to observe the targets and danger signals and in case of doubt to stop. Nor could it overcome the express notice of danger given by plaintiff himself to the engineer that the sidetrack was filled with cars which obstructed the view so he could not see the target. It was plainly the duty of the engineer under the circumstances to stop. His failure to do so was the direct cause of the accident. The fact that plaintiff was helpless to stop the engine does not alter the case. The plaintiff assumed that risk when he entered the employment: *Gibson v. Pacific R. R. Co.*, 46 Mo. 169, 2 Am. Rep. 497. He knew he could never stop the engine. But the engineer is not shown to have been incompetent or an unfit person in any way. So there was no negligence on the part of the defendant in employing him.

It follows that the circuit court erred in holding that the conductor was a vice-principal and also in holding that the engineer and the fireman were not fellow-servants.

2. It is insisted, however, that the master was bound to furnish his servants with safe and suitable appliances for the work, and that it failed in this regard by furnishing a stub-switch instead of a split-switch or split-spring switch, and that if either of the latter had been furnished, the accident in this case would not have occurred.

It is settled law that it is the duty of the master to furnish safe and suitable appliances for his servants to use. He owes this duty to his servant, but his liability in this regard must not be confounded with any question of fellow-servant: ⁴⁰⁴ *Parker v. Hannibal etc. R. R. Co.*, 109 Mo. 407; *Williams v. St. Louis etc. R. R. Co.*, 119 Mo. 316; *Bender v. St. Louis etc. R. R. Co.*, 137 Mo. 240. The evidence shows that with a split-switch or a split-spring switch an engine can safely run through a switch from the reverse side of it without being derailed, but that with a stub-switch the continuity of the main track is broken, and if an engine is run through it from the opposite side it will be derailed. Both the engineer and the fireman knew this fact. They knew this was a stub-switch. They had passed over it every day for over a month. They also knew

the dangers of trying to run through a stub-switch. There is no doubt that a split-switch or a split-spring switch is safer when passing over it in the wrong direction than a stub-switch. In fact, the two former are comparatively and reasonably safe, while the latter is positively dangerous. But there is absolutely no evidence in this case that a stub-switch is not safe and suitable when it is used in the natural and usual manner of using a switch. On the contrary, it was the only kind of a switch that was used for many years. It never was intended to be run through from the wrong direction, nor in fact is there any evidence that the split or split-spring switches are intended to be used in this way. The master cannot be adjudged guilty of a failure of duty where he furnishes a servant machinery and appliances which are reasonably safe when used in the manner they are intended to be used, but which may become dangerous if their use is perverted by the servant. The master is not bound to furnish the safest and best appliances that could be used. He is acquit of fault if what he furnishes is reasonably safe and suitable. A stub-switch is not the safest or best, but it is reasonably safe and suitable. The master cannot be adjudged negligent in this regard: *Tabler v. Hannibal etc. R. R. Co.*, 93 Mo. 79.

The placing of the target on the same side of the main track with the sidetrack is claimed to be negligence. If it had been placed on the other side of the main track, it could ⁴⁰⁵ have been more easily seen by the engineer when going south and would not have been hidden from view by the cars on the sidetrack. But coming north the engineer could not have seen it as well as he could if it was on the east side of the track. Aside from this, the evidence discloses that there is no uniform rule as to which side of the track it shall be placed on. The character and topography of the surroundings usually determine the position. It matters not which side it is placed on; the rules of the company require the engineer and fireman to watch for it, and if it indicates danger, or if they cannot see it, they must take the safe course and stop. If the cars on the sidetrack prevented the engineer or fireman from seeing the target, it was their duty to stop. The conductor's signal to go ahead cannot be construed into meaning anything more than that so far as his end of the train was concerned there need be no stop. It could not reasonably be construed into an order to the engineer to shut his eyes or disregard the rules

and run ahead through an open switch. The conductor was not in a position to know whether the track was clear or the signals and targets obscured from sight or the switch open or not. This was essentially the duty of the engineer and fireman. In no proper sense can the order of the conductor—or, rather, the brakeman, for the engineer got it from the brakeman, and could not have known that the conductor had instructed the brakeman to give it—be said to be a waiver of the rules. This, too, whether the conductor be a vice-principal or a fellow-servant of the engineer.

8. But Missouri is not alone in respect to the uncertain state of the law relating to this subject. Speaking on this matter, Corliss, C. J., in *Ell v. Northern Pac. R. R. Co.*, 1 N. Dak. 336, 26 Am. St. Rep. 621, aptly says: "This issue of law we are to determine, and our investigation must run along the line of general principles, for the adjudications upon this subject—so multitudinous as ⁴⁰⁸ almost to warrant the simile, 'thick as autumnal leaves that strew the brooks in Vallambrosa'—these adjudications are so discordant, enumerating so many rules, stating so many limitations, applying the law to facts so diverse, that one is reminded of Gibbon's remark upon the infinite variety of laws and opinions when Justinian entered upon the reform of codification, that they were beyond the power of any capacity to digest."

The learned judge, speaking of the test sometimes applied of power to observe and right to report the conduct of each other, as decisive of the relation of master and servant, or of whether the injured and the negligent servant belong to the same "department of service," says: "Many of the cases holding the master exempt from liability under the fellow-servant rule were, as we have said, cases in which the injured servant could not possibly have exerted influence over the negligent servant. Their separate departments of service or their usual stations of employment kept them, as a rule, entirely aloof from each other. In the following cases the relation of fellow-servant was held to exist between persons who could exert little, if any, influence over each other: *Quebec Steamship Co. v. Merchant*, 133 U. S. 375, the carpenter, the porter, and stewardess of a steamship; *St. Louis etc. Ry. Co. v. Welch*, 72 Tex. 298, foreman of a bridge gang, and servants operating train; *Elliot v. Chicago etc. R. R. Co.*, 5 Dak. Ter. 523, a section foreman and a conductor; *Fagundes v. Central etc. R. R. Co.*, 79 Cal. 97, a laborer employed to remove snow from

track and a conductor; *Baughman v. Superior Court*, 72 Cal. 573, a conductor and a brakeman; *Randall v. Baltimore etc. R. R. Co.*, 109 U. S. 478, a brakeman and a conductor of different trains; *Van Wickle v. Manhattan Ry. Co.*, 32 Fed. Rep. 278, a track repairer and an engineer; *McMasters v. Illinois Cent. R. R. Co.*, 65 Miss. 264, 7 Am. St. Rep. 653, brakeman of one train and an employé on another; *Naylor v. New York etc. R. R. Co.*, 33 Fed. Rep. 801, engineer and switchman; *Van Avery v. Union etc. R. R. Co.*, 35 Fed. Rep. 40, engineers of different trains; *Connelly v. Minneapolis etc. R. R. Co.*, 38 Minn. 80, a ⁴⁰⁷ sectionman and an engineer or brakeman; *Howard v. Denver etc. R. R. Co.*, 26 Fed. Rep. 837, an engineer and fireman of different trains; *H. etc. R. R. Co. v. Rider*, 62 Tex. 267; *Gormley v. Ohio etc. R. R. Co.*, 72 Ind. 31; *Collins v. St. Paul etc. R. R. Co.*, 30 Minn. 31; *Keyes v. Pennsylvania R. R. Co. (Pa., Jan. 4, 1886)*, 3 Atl. Rep. 15; *Whaalan v. Mad River etc. R. R. Co.*, 8 Ohio St. 249, in each case an engineer and a sectionman."

In the same case attention is called to the reasoning of Judge Cooley in his work on Torts (543), in which he combats the idea that the question can be solved by reference to the grades of the injured and negligent servants respectively, and denies that reason or logic or public policy gives sanction to such a doctrine.

Reference is also made to the article of Judge Dillon in 24 *American Law Review*, 175, which is so appropriate to this case as to justify its verbatim reproduction here, as follows: "The master owes certain defined, personal, inalienable, non-assignable duties toward servants. These personal duties may be devolved on others by the master, but not without recourse on him. . . . In the general American law, as I understand it, the doctrine of vice-principal exists to this extent and no further, viz.: That it is precisely commensurate with the master's personal duties toward his servants; as to these the servant who represents the master is what we may call for convenience a vice-principal for whose acts and neglects the master is liable. Beyond this the employer is liable only for his own personal negligence. This is a plain, sound, safe, and practicable line of distinction. We know where to find it and how to define it. It begins and ends with the personal duties of the master. Any attempt to refine based upon the notion of 'grades' in the service, or, what is much the same thing, distinct 'departments' in the service (which departments fre-

quently exist only in the imagination of the judges and not in fact), will only breed the confusion of the Ohio and Kentucky experiments, whose courts have constructed a labyrinth in which the ⁴⁰⁸ judges that made it seem to be able to 'find no end in wandering mazes lost.' The real inquiry is, Was the injury caused by another servant one of the ordinary risks of the particular employment? If so, the grade, whether higher, lower, co-ordinate, or the department of the faulty servant, is of no consequence. It is a condition of the contract of service that the servant takes upon himself the risk of accidents in the common course of the business, all open and palpable risks, including the negligence of all fellow-servants of whatever grade in the same employment."

In view of the dubious state of the law on this subject in our own and sister states, brought about by the introduction of new, but not useful, rules and theories, is it not time to set the target signal of danger, and to return to the beaten track, lit up by the "gladsome light of jurisprudence," which the experience of ages and the wisdom of the brightest legal minds of the world has laid out for us, and to cease, like moths, to burn our wings in the candles of "grades" and "departments"?

The judgment of the circuit court is reversed.

Robinson and Williams, JJ., concur in the judgment of reversal herein, on the ground that the negligence shown was that of the engineer, who under the decisions in this state was a fellow-servant with the plaintiff, but do not regard the "departmental doctrine" as involved in this case.

Brace, J., dissents.

VICE-PRINCIPAL.—WHO IS a vice-principal is discussed in the extended note to *Mast v. Kern*, 75 Am. St. Rep. 584-640.

FELLOW-SERVANTS—WHO ARE.—A conductor, a telegraph operator, and a fireman are fellow-servants; so are a brakeman and a conductor acting as engineer, and a brakeman on one train and an engineer on another: Note to *Fisk v. Central Pac. R. R. Co.*, 1 Am. St. Rep. 32. Compare the extended note to *Mast v. Kern*, 75 Am. St. Rep. 608-611.

FELLOW-SERVANTS.—A MASTER IS NOT ANSWERABLE for an injury to his servant occasioned by the negligence of a fellow-servant: *Newbury v. Getchel etc. Mfg. Co.*, 100 Iowa, 441, 62 Am. St. Rep. 582; unless the latter was incompetent and unfit for the service, and this was known, or should have been known, by the master: *Park v. New York Cent. etc. R. R. Co.*, 155 N. Y. 215, 63 Am. St. Rep. 663.

MASTER AND SERVANT—SAFE APPLIANCES.—A master's duty to his servant requires the exercise of reasonable care in furnishing suitable machinery and appliances for carrying on the business in which the servant is employed: *Nord Deutscher etc. Co. v. Ingebregsten*, 57 N. J. L. 400, 51 Am. St. Rep. 604; *Meador v. Lake Shore etc. Ry. Co.*, 138 Ind. 290, 46 Am. St. Rep. 384. But an employer is not bound to furnish his workmen with the safest machinery, in order to save himself from liability for accidents arising from its use: *Lehigh etc. Coal Co. v. Hayes*, 128 Pa. St. 294, 15 Am. St. Rep. 680; *Wormell v. Maine etc. R. R. Co.*, 79 Me. 397, 1 Am. St. Rep. 321. Compare *Troxler v. Southern Ry. Co.*, 124 N. C. 189, 70 Am. St. Rep. 580.

DUNHAM v. HARTMAN.

[153 Missouri, 625.]

CONTRACTS — STATUTE OF FRAUDS — TRUSTEE'S SALES.—MEMORANDUM made on the sale-book of a sheriff, acting as trustee at an auction sale of land under foreclosure of a deed of trust, not showing what land was sold nor to whom, is not admissible as evidence of a contract of sale against the alleged bidder for refusal to take the land. Such memorandum is not admissible if made after the bidder has refused to take the land on the ground that there were prior encumbrances on it.

CONTRACTS—STATUTE OF FRAUDS—MEMORANDUM OF TRUSTEE'S SALE—WITHDRAWAL OF BID.—Between the fall of the hammer at an auction sale of land by a trustee under foreclosure of a deed of trust and the writing of the bidder's name and description of the land sold in the memorandum-book of sale he may withdraw his bid, and such memorandum made after his withdrawal has no binding force against him as a contract of sale.

CONTRACTS—STATUTE OF FRAUDS—TRUSTEE'S SALE —MEMORANDUM TO BIND BIDDER.—At an auction sale of land under foreclosure of a deed of trust, the trustee, acting as auctioneer, or a sheriff, acting as substituted trustee, in his individual capacity, is not the agent of the buyer, so as to bind him by a memorandum made at the sale.

J. A. Kemper and Barnett & Barnett, for the appellant.

O. L. Houts, for the respondent.

VALLIANT, J. This is a suit to recover of defendant damages for refusing to complete a purchase of land which it is alleged was struck off to him on his bid at a foreclosure sale under a deed of trust. Upon the trial at the close of the plaintiff's evidence the court instructed the jury that under the evidence the plaintiff was not entitled to recover. Plaintiff took a nonsuit with leave, and after an ineffectual motion to set the same aside, brought this appeal.

The evidence tended to show that in 1892 the then ^{own}ers of the land executed a deed of trust to one Youngs, trustee, to secure a debt therein specified, subject to prior encumbrances referred to. It was provided in the deed that in the case of Youngs' inability or refusal to act when the debt was due and payment not made, the then acting sheriff of Johnson county might proceed to foreclose by sale, etc., as therein directed. Youngs did decline to act, and the holder of the debt and deed of trust requested the plaintiff in this suit, who was then the sheriff of that county, to proceed to sell according to the requirements of the deed, which he did. It was an auction sale at the courthouse door, conducted by the sheriff in person, assisted by one of his deputies, who read the advertisement for him. At this auction the defendant bid three thousand and fifty dollars, and the property was struck off to him. The parties went from the place of sale to the sheriff's office apparently to close the matter and the defendant was about to write a check for the amount of his bid, when it was suggested by some one present that the sale was made subject to the prior encumbrances. Then defendant said he "did not figure it that way," and would go and see about it. He then went out and returned in about two hours and said he would not take the property unless he was compelled to. After that the sheriff readvertised and held another auction sale, at which the property was struck off to M. C. Shryack and C. H. Harrison, the highest bidders, for seven hundred and twenty-five dollars, which sale was consummated. The second sale was about a month after the first.

Plaintiff offered in evidence the following: "I now offer in evidence this memorandum found on page 270 of the sheriff's sale-book, the memorandum made by the sheriff and the one made by the deputy sheriff, so far as can be ascertained. Which memorandum is in words and figures as follows, to wit: 'Sold to W. H. Hartman for \$3,050. Sold to M. C. Shryack and C. H. Harrison.'" Defendant objected to this as evidence, and the court sustained the objection. Up to this time there had been no evidence of the refusal of the trustee to act, ^{and} and the request of the holder of the note that the sheriff execute the trust, but such evidence immediately followed the ruling excluding the memorandum, but the memorandum was not again offered. Just when and by whom the memorandum was made is not certain; the deputy sheriff testifies that he made it as soon as the land was struck off to the defend-

ant, while the sheriff testifies that he made it himself after the defendant returned to his office the second time and informed him that he would not take the land if he was not compelled to, which was about two hours after the auction was over. The next day a deed was tendered to defendant, which he refused. What else, if anything, was on the page 270 mentioned besides the memorandum read is not shown by the evidence. There was testimony tending to show that before offering the property for sale the sheriff announced that it was to be sold subject to the encumbrances. Whether or not defendant was within hearing at that time does not appear. This was substantially all that the evidence tended to prove.

1. If we assume that the sheriff was the implied agent of the defendant and as such authorized to make the memorandum required by the statute of frauds to bind him, the plaintiff's case fails because the memorandum attempted to be shown in evidence is itself insufficient. All that we are told of the memorandum is that it was made on the sheriff's sale-book and is in these words: "Sold to W. H. Hartman for \$3,050." It was perhaps intended to be shown that this memorandum was written on a page in the book in which was the notice of sale containing the names of the parties and a description of the property, but if the page contains anything of that kind it was not offered in evidence and the record does not show it. In *Ringer v. Holtzclaw*, 112 Mo. 522, it is said: "All the authorities are agreed that the memorandum must state the contract with reasonable certainty, so that its essential terms can be ascertained from the writing itself without resort to parol evidence." This memorandum ⁶³⁰ does not show what was sold, nor for whom the sale was made. Besides, we are left in doubt between the plaintiff's two main witnesses as to who made the memorandum and when it was made. Ordinarily, when the sheriff is acting officially, it makes no difference whether he or his deputy does the act, but in this instance it does make a difference, because if the sheriff did it, it was not done until after the controversy had arisen and after the defendant had refused to consummate the sale, two hours after the auction was over. If there was an implied agency, that agency was revoked by the defendant's repudiation of the transaction. Certainly, the agent could not act in spite of his principal, and do for him in his presence what he refused to do for himself. Between the fall of the hammer and the writing of his name in the memorandum the bidder has a locus peni-

tentiae, and may withdraw his bid: *Pike v. Balch*, 38 Me. 302, 61 Am. Dec. 248; *Gwathney v. Cason*, 74 N. C. 5, 21 Am. Rep. 484.

The memorandum was: "Sold to W. H. Hartman for \$3,050. Sold to M. C. Shryack and C. H. Harrison." We cannot reconcile the statements of the sheriff and his deputy by concluding that the sheriff was referring to the Shryack and Harrison part of the memorandum, because he said he made the memorandum directly after defendant came to his office the second time that afternoon and refused to take the property, which was about two hours after the sale. The sale to Shryack and Harrison was nearly a month after. The recognizing of the auctioneer as the agent of both parties in such transactions is one of those judicial encroachments on the terms of the statute of frauds that we inherited with the statute itself from England, and grew out of what the courts considered a necessity; but having gone to the extent of creating an agent for the party sought to be charged, the courts have always required that his act should be proven with reasonable certainty, and this the plaintiff failed to do in this case.

2. But was the sheriff acting in his official capacity here, and was he for this purpose the defendant's agent? In ⁶⁸¹*Tull v. David*, 45 Mo. 444, 100 Am. Dec. 385, it was held that at an auction sale under a deed of trust the trustee acting as auctioneer is not the agent for the buyer so as to bind him by a memorandum made at the sale. The ground of the decision is that to construe the trustee under such circumstances to be the agent of the bidder would be to make one party to the supposed contract the other's agent to make the contract. The court quotes from *Bent v. Cobb*, 9 Gray, 397, 69 Am. Dec. 295: "The great mischief intended to be prevented by the statute would still exist if one party to a contract could make a memorandum of it which could absolutely bind the other. If such were its true construction, it would be feeble security against fraud, or, rather, it would open a door for its easy commission. . . . Nor can it make any difference as to the power of the vendor to make the memorandum binding on the vendee that the sale is made by the former in his representative or fiduciary character as executor, administrator, guardian, or trustee." This court in that case further say: "We are referred to no decided case that adopts the principle contended for by the plaintiff in this suit. The nearest approach to it is found in the case of *Wiley v. Rob-*

ort, 27 Mo. 388, and *Stewart v. Garvin*, 31 Mo. 36, where it is held that a sheriff, in selling lands under an order of court in proceedings for partition, is a competent agent of the parties to make a binding memorandum of the sales made by him. . . . But the sheriff in such cases acts simply in the execution of a judicial power of sale, and not in strictness as a trustee. No title is vested in him. He acts merely as the instrument of the law in effecting the sale and conveyance. He is a public officer, and holds his position under the provisions of law, and not as the mere appointee of private parties."

In *Tatum v. Holliday*, 59 Mo. 422, it is held that where a trustee dies and the court appoints the sheriff to foreclose the deed of trust, the sheriff acts in his official capacity; and the court say, *arguendo*, that he is responsible on his bond for his act. There the trustee had died and the circuit court had ^{made} made the appointment of the sheriff upon the petition of the party in interest as required by the statute: *Wagner's Compiled Statutes of 1872*, p. 1347; *Rev. Stats. 1889*, sec. 8683. Upon that authority the St. Louis court of appeals decided likewise in *Barclay v. Bates*, 2 Mo. App. 139. If the condition arises and the court appoints the sheriff to foreclose the deed of trust as the statute requires, he is as much bound to perform that duty as he would be under a decree of sale to foreclose a mortgage or to sell for partition, and his official bond covers his acts. But an individual cannot impose official duty on the sheriff, and the sheriff cannot by contract enlarge his official character.

In the case at bar the sheriff was not appointed by the court nor in pursuance of the statute, but by an individual and in pursuance of the terms of a private deed. In such a case he is no more acting in his official capacity, nor liable as such, than he would be if he were employed to assist in any other private business. Whereas, when he is appointed by the court, in the words above quoted, "he acts simply in the execution of a judicial power," but when he is employed by an individual he is simply a substituted trustee. In the one case he is responsible as sheriff on his bond; in the other he is only liable as an individual. In the one case, if the law were still as it was when *Stewart v. Garvin*, 31 Mo. 36, *Tatum v. Holliday*, 59 Mo. 422, and *Springer v. Kleinsorge*, 83 Mo. 152, were decided he would have the authority as the implied agent of the bidder to make a memorandum to bind him in the face of the statute of frauds; in the other he would have no such authority.

We hold that in this case the plaintiff was only a substituted trustee acting in his individual, and not in his official, capacity, and had no authority to bind the defendant by any memorandum he may have made.

3. The doctrine of agency in the auctioneer for both seller and buyer was established when the statute was such that the authority of an agent to bind his principal in a contract for the sale of land need not have been in writing, but might ~~ess~~ have been conferred orally or have been implied: *Browne on Statute of Frauds*, 5th ed., secs. 370, 370a. In 1887 our statute was amended so as to require the agent's authority to be in writing; since then it would be difficult to find any theory on which to base a claim on the implied agency of the auctioneer in a contract for the sale of land.

4. There is nothing in the plaintiff's case that particularly commends it to one's sense of justice. The fact that at a resale within a month he sold this property for seven hundred and twenty-five dollars, which he wanted to force on the defendant for three thousand and fifty dollars, gives this case the aspect of an effort to take a hard advantage.

We think the learned trial judge had the right conception of the case when he instructed for a nonsuit.

The judgment is affirmed.

Brace, P. J., and Robinson, J., concur.

Marshall, J., concurs in result.

AUCTION—MEMORANDUM OF SALE.—A purchaser at an auction sale under a deed of trust is not bound by a memorandum of sale made by the trustee, who was his own auctioneer: *Tull v. David*, 45 Mo. 444, 100 Am. Dec. 385. Upon a sale of realty at auction the memorandum of the auctioneer must show the material conditions of the contract, or no action will lie thereon: *O'Donnell v. Leeman*, 43 Me. 158, 69 Am. Dec. 54. See, further, the note to *Davis v. Rowell*, 18 Am. Dec. 398-400.

AN AUCTION SALE IS NOT COMPLETE UNTIL the auctioneer, acting as agent of both parties, enters the purchaser's name in his memorandum-book, or until some other requirement of the statute of frauds is performed. Till then, a time for repentance remains and the sale is not perfected: *Pike v. Balch*, 38 Me. 302, 61 Am. Dec. 248.

WESTMEYER v. GALLENKAMP.

[154 Missouri, 28.]

SERVICE OF PROCESS ON INFANTS—SUFFICIENCY.—Where the statute requires that a summons shall be served “by reading the writ to the defendant, and delivering to him a copy of the petition,” or “where there are several defendants, by delivering to the defendant who shall be first summoned a copy of the petition and writ, and to such as shall be subsequently summoned a copy of the writ,” the reading of the petition and writ to several infants and delivering a copy of the petition to the one first named does not constitute a valid service of process on any of the infants, unless it be the first.

INFANTS—JURISDICTION OVER—SERVICE OF PROCESS.—Infants must be served with process the same as adults, and unless so served in the manner provided by law the court has no jurisdiction over them, and the appointment of a guardian ad litem for them, without such service, is void and the proceedings thereupon coram non jure.

SERVICE OF PROCESS—CHANGE IN LAW.—Ignorance in regard to a change in the law relating to the service of process can furnish no excuse for depriving an infant of his property without due process of law, and service on an infant not in accordance with the changed law is not merely irregular, but void.

SERVICE OF PROCESS.—INFANTS can neither acknowledge nor waive the service of process by which alone they can be subjected to the jurisdiction of the court.

INFANTS — ADVERSE POSSESSION AGAINST — PARTITION.—Where a widow is by law entitled to the mansion house of her husband and the messuages belonging thereto until dower is assigned, such dower never being assigned to her, and where her possessory rights are not forfeited by remarriage, the statute of limitations does not begin to run against her husband's infant children until after her death, and the possession of the premises by a purchaser under a deed of partition, made during her life, where the infants have never been legally served with process, is not adverse to such infants so as to bar an action by them brought within the proper time after her death.

J. C. Kiskaddon, for the appellants.

J. W. Booth and Charles F. Gallenkamp, for the respondent.

³¹ **BRACE, P. J.** This is an action in ejectment to recover lot 2 in block 3 in Meuse's addition to the city of Washington, in Franklin county, Missouri. The petition is in the usual form, and the answer is a general denial. Judgment was for the defendant in the circuit court, and the plaintiffs appeal. There is no dispute about the facts. Bernard Westmeyer, who died intestate in the year 1854, is the ³² common source of title. The plaintiffs are three of his children, and as his heirs at law are entitled to the undivided twenty-one thirtieths of

said lot (except nine inches off the east side thereof, the title of which is conceded to be in defendant), unless their title has been devested by a proceeding in partition in the circuit court of Franklin county or by adverse possession.

At the time of the death of the said Bernard he was residing on the premises with his family, which consisted of his wife Henrietta and six minor children, all under the age of fourteen years. By the law then in force it was provided that "until dower be assigned, the widow may remain in and enjoy the mansion house of her husband, and the messuages and plantation thereto belonging, without being liable to pay any rent for the same": 1 Rev. Stats. 1855, p. 672, sec. 21. On the 20th of August, 1856, the widow of said Bernard, as plaintiff, instituted the suit in partition, by petition and summons, against her six minor children, of whom Mary, the oldest, was then aged about fifteen years. The service of the writ of summons as returned by the sheriff is as follows: "Served the within petition and writ on Mary Westmeyer, Henry Westmeyer, Margaret Westmeyer, William Westmeyer, Adolph Westmeyer, and Louisa Westmeyer in Franklin county, Missouri, on the 21st of August, 1856, by reading the same to each of them, and also by delivering to Mary Westmeyer a certified copy of this petition." By the law then in force the writ of summons in suits in partition was required to be served in like manner "as writs issued in ordinary civil actions" (2 Rev. Stats. 1855, p. 1112, sec. 8), and the personal service, with which alone we have to do in this case, required in such actions was as follows: "1. By reading the writ to the defendant and delivering to him a copy of the petition; or 2. By delivering to him a copy of the petition and writ; . . . or 4. Where there are several defendants, by delivering to the defendant who shall be first summoned a ^{ss} copy of the petition and writ, and to such as shall be subsequently summoned a copy of the writ": 2 Rev. Stats. 1855, p. 1223, sec. 7. After the return of the writ served as aforesaid a guardian ad litem was appointed for the defendants, who answered, and in due course the suit proceeded to final judgment, and a sale of the premises, at which one Christian Kruse, on the 10th of April, 1857, became the purchaser thereof, and received a sheriff's deed therefor, dated December 20, 1858. Pending these proceedings the said Kruse married the widow, went into possession of the premises, and afterward, by deed dated May 10, 1859, in which his wife joined, conveyed the same to one Frederick Schroeder, who then went into pos-

session and whose title the defendant has acquired by mesne conveyances, and he and his grantors have ever since been in peaceable and uninterrupted possession of the premises. Christian Kruse died in May, 1885, and the said Henrietta, after being again married June 22, 188-, to one Hagemann, died on the 19th of May, 1894, and this action was commenced on the 18th of August, 1896.

1. By the construction placed upon the statute in question in *Lenox v. Clarke*, 52 Mo. 115, in which the fourth clause of section 7 was pieced out with the first, in order to sustain the service, it might be held that Mary Westmeyer was legally served with process in the partition suit, but by no possible construction could it be held that the other defendants, including the plaintiffs in this case, to none of whom was delivered either a copy of the petition or of the writ, was legally served—and this does not seem to be disputed. In some jurisdictions the doctrine once obtained that a court of general jurisdiction possessing plenary chancery powers could, by the appointment of a guardian ad litem, in a pending litigation, acquire jurisdiction of the person of an infant, and bind his estate by its decree, although the infant had not been served with process. And there are some early decisions in this state under the law as it existed prior to the adoption of ³⁴ this partition proceeding and our practice act that seem to give some countenance to this doctrine: *Day v. Kerr*, 7 Mo. 426; *Hite v. Thompson*, 18 Mo. 461; *Shaw v. Gregoire*, 35 Mo. 342. But whatever footing it may once have had in this state, it has long since been thoroughly exploded, and by a long line of uniform and well-considered cases, the doctrine has been well established that infants must be served with process the same as adults, and that unless so served in the manner provided by law, the court has no jurisdiction over them, and the appointment of a guardian ad litem for them without such service is void and the proceedings thereupon coram non iudice: *Hendricks v. McLean*, 18 Mo. 32; *Smith v. Davis*, 27 Mo. 298; *Baumgartner v. Guessfeld*, 38 Mo. 37; *Gibson v. Chouteau*, 39 Mo. 537; *Shaw v. Gregoire*, 41 Mo. 407; *Kansas City etc. R. R. Co. v. Campbell*, 62 Mo. 585; *Campbell v. Laclede Gas Light Co.*, 84 Mo. 352; *Fischer v. Siekmann*, 125 Mo. 165; *Bogart v. Bogart*, 138 Mo. 419. And such also seems to be the doctrine established generally by the great weight of authority: 10 *Ency. of Pl. & Pr.*, 643, note 2.

It is suggested by counsel for respondent, in explanation of the manner in which the writ was served in the partition suit, that the service is in accordance with the statute of 1849, and that the enactment of 1855 was first published in the Revised Statutes of that year, and that they may not have been distributed, or the latter enactment brought to the attention of the attorneys or the court at the time the suit was commenced, and that this fact should be taken into consideration in determining the validity of the service, and on the authority of *Thompson v. Chicago etc. R. R. Co.*, 110 Mo. 147, and *Leonard v. Sparks*, 117 Mo. 103, 38 Am. St. Rep. 646, it is contended that the service, though irregular, was not void. In answer to the suggestion it is only necessary to say that ignorance of the law excuses no one, and that such ignorance can furnish no excuse for depriving an infant of his property without due process of law. And as to these cases, that ³⁵ they are not analogous and not in point. In the first of these cases the sufficiency of the service of notice in a condemnation proceeding was attacked by the plaintiff. The court, without determining the question whether the notice attacked was served in the manner required by law, held that, as in the proceeding, two notices to the owner were required, and as no question was raised as to the sufficiency of the second notice, and as if, in pursuance thereof, the plaintiff, an adult and sui juris, had appeared, he would have had ample opportunity to be heard upon every question affecting his substantial rights, he had had his day in court, and the proceeding was not subject to his collateral attack.

In the second case the attack was also on the sufficiency of a notice in a condemnation proceeding. The owner was served only five days before the day named for his appearance, and the law required at least six days. He was an adult sui juris, had been personally served in the manner required by law, was competent to waive service for the full length of time, and the court held that it was his duty, if he desired to take advantage of the insufficiency of the period of notice, to have appeared to the proceeding and made his objections, and not having done so, the jurisdiction of the court to render judgment against him was not defeated.

The distinction between those cases and the case in hand is obvious. Here the plaintiffs were infants of tender years. They were not served in the manner provided by law. They never had their day in court. They could neither acknowledge

nor waive service of the process by which alone they could be subjected to the jurisdiction of the court, nor could they appear therein to protect their interests, and these cases furnish no authority for holding that the service on them in the partition suit was merely irregular and not void. It follows from what has been said that the judgment should have been for the plaintiffs, unless they are barred by the statute of limitations.

2. Upon this question little need be said. This suit was brought within three years after the death of the widow of Bernard Westmeyer. The premises were the home, the mansion house and the messuages thereto belonging of the said Bernard at the time of his death. The possessory rights of the widow therein are defined by statute, and are not subject to forfeiture by remarriage as at common law. Her dower was never assigned to her by the heirs at law during her life, and the possession of the defendant and his grantors who came in under the deed in partition was not adverse to the plaintiffs during her life; hence the defendant acquired no title by adverse possession: *Jones v. Manly*, 58 Mo. 559; *Brown v. Moore*, 74 Mo. 633; *Roberts v. Nelson*, 86 Mo. 21; *Holmes v. Kring*, 93 Mo. 452; *Hickman v. Link*, 97 Mo. 482; *Sherwood v. Baker*, 105 Mo. 472, 24 Am. St. Rep. 399; *Null v. Howell*, 111 Mo. 273; *Thomas v. Black*, 113 Mo. 66; *Fischer v. Siekmann*, 125 Mo. 165; *Carey v. West*, 139 Mo. 146.

The judgment of the circuit court will be reversed and the cause remanded, with directions to enter judgment for plaintiffs in accordance with the views expressed in this opinion, and for nominal damages as agreed upon.

All concur.

INFANTS—SERVICE OF PROCESS ON.—A judgment rendered without actual service of process on minor defendants who were represented by a guardian ad litem appointed by the court is not void, and cannot be attacked collaterally: *Alston v. Emmerson*, 83 Tex. 231, 29 Am. St. Rep. 639. See, too, *Sloane v. Martin*, 145 N. Y. 524, 45 Am. St. Rep. 630; and the monographic note to *Sanford v. Edwards*, 61 Am. St. Rep. 492.

ADVERSE POSSESSION.—The possession of a widow, so long as her dower remains unassigned, is not adverse to the heirs, nor to one who purchases under a sale made by the administrator of her husband: *Sherwood v. Baker*, 105 Mo. 472, 24 Am. St. Rep. 399. See, too, *Lumley v. Haggerty*, 110 Mich. 552, 64 Am. St. Rep. 364. If realty is covered by assigned dower, possession cannot be adverse to the remainderman until the termination of the dower estate: Note to *Woodstock Iron Co. v. Fullenwider*, 18 Am. St. Rep. 79.

CRAMER v. HURT.

[164 Missouri, 112.]

WITNESSES — PHYSICIANS — PRIVILEGED COMMUNICATIONS.—In a suit by a husband against a physician for malpractice in the treatment of his wife, the physician may testify concerning any information which he may have acquired while attending her in a professional capacity, which information was necessary to enable him to properly treat her, notwithstanding a statute prohibits such disclosures without the consent of the patient, since no other person besides himself and the wife knows anything about the facts, and the proof of such facts is necessary to sustain his defense.

WITNESSES—HUSBAND AND WIFE.—In a suit by a husband against a physician for malpractice in treating his wife, the necessities of the case render the wife a competent witness in favor of her husband, where the facts in the case are known only to the physician and to the wife, and without her testimony the remedy afforded the husband by law will fail, notwithstanding that at common law a married woman is incompetent to testify in behalf of her husband.

WITNESSES—HUSBAND AND WIFE—PUBLIC POLICY.—On general grounds of public policy, a married woman is a competent witness for her husband, in a suit for damages by him against a physician who produces an abortion upon her without the consent of her husband.

WITNESSES—PHYSICIAN AND PATIENT—WAIVER OF PRIVILEGE.—A married woman who, in a suit by her husband alone against a physician for malpractice on her, is called by her husband as a witness, does not waive the protection of a statute which prohibits her physician from disclosing any information obtained by him in the course of his employment without her consent.

WITNESSES — PHYSICIAN AND PATIENT — WAIVER.—The bringing of a suit by a husband against a physician for malpractice on his wife does not constitute a waiver of her statutory protection and privilege of closing the physician's mouth.

H. A. Edwards, for the appellant.

W. M. Williams and John Cosgrove, for the respondent.

115 BURGESS, J. This is an action by plaintiff against the defendant, a practicing physician, for damages in the sum of five thousand dollars for producing an abortion upon plaintiff's wife, Cellantine Cramer, and in so doing using upon her body and womb certain surgical instruments, by reason of which she became greatly wounded and diseased of her body, sick, and her life endangered, and she wholly unable to perform her domestic duties as his wife, and to give him such social companionship and to perform such social and conjugal duties as he is entitled to from her, and for moneys expended by him for medicine for her and for medical services.

The answer admits that Callantine Cramer is the wife of plaintiff; that defendant is a practicing physician; that she called upon him on the twenty-fifth day of July, 1895, for treatment, and was treated by him, and alleges that such treatment was according to his best judgment and skill, and denies all other allegations in the petition. By reply all new matter set up in the answer is denied. There was a verdict and judgment for defendant, and after unsuccessful motion for a new trial plaintiff appeals.

There was testimony tending to sustain the allegations in the petition, as well also as the defense set up in the answer. During the trial Mrs. Cramer was offered as a witness in behalf of her husband, but upon objection by defendant upon the ground that she was incompetent to testify on the part of her husband she was not permitted to testify.

Over the objection and exception of plaintiff the defendant, who was introduced as a witness in his own behalf, was permitted to testify concerning information which he acquired from the wife of plaintiff while attending her in a professional character, by an examination of her body and from conversation with her, which was necessary, according to his testimony, in order to enable him to treat her, as well also as to the conversations had between himself and her with respect to her ¹¹⁶ condition and the treatment necessary in her condition, what he said to her, etc., and in this ruling plaintiff insists that the court committed reversible error.

By section 8925 of the Revised Statutes of 1889, a physician or surgeon is prohibited from testifying concerning any information which he may have acquired from any patient while attending him or her in a professional character, if such information is necessary to enable him to prescribe for such patient as a physician, or to do anything for such patient as a surgeon, and unless this statute does not mean what it says, or the necessities of the case are such as to render the testimony competent notwithstanding the statute, or the privilege accorded by the statute to plaintiff's wife of suppressing as evidence information acquired by the defendant while attending her in a professional capacity was waived by her and her husband by the institution of this suit, or by the offer of Mrs. Cramer by plaintiff as a witness in the case, the position seems to us to be well taken.

This statute was intended for the protection of the patient against the disclosures of information obtained by a physician

in course of his employment as such without the consent of the patient, and in this case, unless such evidence was admissible upon the ground of the exigencies of the case, or such privilege was waived by the plaintiff, the evidence objected to was not admissible.

Under the Michigan statute upon the same subject, which is substantially the same as ours, the supreme court of that state, in construing it in *Grand Rapids etc. R. R. Co. v. Martin*, 41 Mich. 671, said: "The objection that a physician cannot reveal with his patient's consent what he has learned during his treatment is one which, if valid, would render it impossible in either civil or criminal cases to use the only testimony which would show the nature and extent of disease. The statute is one passed for the sole purpose of enabling persons to secure medical aid without betrayal of confidence. It is ¹¹⁷ only a question of privilege, and such communications are on the same footing with any other privileged communications which the public has no concern in suppressing when there is no desire for suppression on the part of the persons concerned": See, also, *Groll v. Tower*, 85 Mo. 254, 55 Am. Rep. 358.

But defendant contends that the necessities of the case are such as to render the testimony of defendant competent. In *Henry v. Sneed*, 99 Mo. 407, 17 Am. St. Rep. 580, it was held that plaintiff and his wife might testify as to conversations between themselves as to the transaction in question, as part of the *res gestae*, and also on the ground of fraud, and this because of the necessity of the matter.

So where a husband, in furtherance of the fraud of others, prevailed upon his wife to sign a note and encumber her property, in the absence of other evidence, and in order to expose the fraud in all its details, it was held that a court of equity would, because of the necessity of the matter, permit both husband and wife to testify with respect to the conversations had between them in regard to the transaction: *Moeckel v. Heim*, 134 Mo. 576.

While under the general common-law rule *Mrs. Henry* and *Mrs. Moeckel* would have been incompetent to testify in these cases, their husbands being their coparties, the rulings in them are justified upon the ground of the matters testified to by them being within their own personal knowledge and their testimony a matter of necessity. So in the case at bar, the facts to which the defendant was permitted to testify with respect to the condition of *Mrs. Cramer*, his treatment of her, and the facts

obtained from her with respect to her condition were within the exclusive knowledge of her and himself. No other person knew of their own personal knowledge anything about them, and, while it must be understood that such evidence cannot be admitted, merely because other evidence of the facts cannot be obtained, yet in a suit against a physician by the husband for damages, where it is clear that no other person ¹¹⁸ besides himself and the wife knows anything personally about the facts, and the proof of such facts are necessary in sustenance of his defense, it is not error to permit him to testify to such facts in order to prevent injustice being done. "For, where the law can have no force but by the evidence of the person in interest, there the rules of the common law respecting evidence in general are presumed to be laid aside; or, rather, the subordinate are silenced by the most transcendent and universal rule that in all cases that evidence is good, than which the matter of the subject presumes none better to be attainable": 1 Greenleaf on Evidence, 14th ed., sec. 348. There was, therefore, no error committed in this regard, notwithstanding the inhibition in the statute before quoted.

But it must for the same reason follow that Mrs. Cramer is a competent witness for her husband, notwithstanding at common law, as a general rule, a married woman is incompetent to testify in behalf of her husband. It may, however, be said that because section 8922 of the Revised Statutes of 1889 provides that "no married woman shall be disqualified as a witness in any civil suit or proceeding prosecuted in the name of or against her husband, whether joined or not with her husband as a party," in the cases therein specified, which do not include cases of the kind and character of the one at bar, that, therefore, the common-law rule with respect to the incompetency of a married woman as a witness for her husband in a suit by him, otherwise than in exceptional cases, is still in force. But notwithstanding this statute and the common-law rule, it was held in both the cases of *Henry v. Sneed*, 99 Mo. 407, 17 Am. St. Rep. 580, and *Moeckel v. Heim*, 134 Mo. 576, that Mrs. Henry and Mrs. Moeckel were competent witnesses.

As was well said by Sherwood, J., in speaking of somewhat similar statutes in *Ex parte Marmaduke*, 91 Mo. 257, 60 Am. Rep. 250; "And being itself a remedial section, giving a testifying capacity where none existed before, and all the sections forming but one system, and being construed together as but ¹¹⁹ one statute, they are to be construed liberally, are to re-

ceive an equitable interpretation, whereby the letter of the act or section will be sometimes enlarged or sometimes restrained so as more effectually to meet the beneficial end in view, and prevent a failure of the remedy. A noted illustration of this principle is found in the ruling made upon the registry acts, where, notwithstanding the strict provisions of those acts, prior registry of a deed was not allowed to countervail the effect of actual notice": Citing 1 Kent's Commentaries, 465, and cases cited; Smith's Common Law, secs. 520, 547.

As further illustrative of this rule, a married woman was a competent witness at common law for her husband in an action by him against a carrier for the negligent loss of her trunk, with respect to the articles lost and the value thereof. She is now a competent witness under the statute (Rev. Stats. 1889, sec. 8922) in such a case, so far as relates to the loss of property and the amount and value thereof.

The strict rule of evidence under which, as a general rule, witnesses are only allowed to testify as to facts is further relaxed in cases of long accounts, or of many books and papers which could not conveniently take place in court, they may testify as to the result of their investigation of the books, and this, too, although the books are present in court at the time: 1 Greenleaf on Evidence, 14th ed., sec. 93.

So in *Mathias v. O'Neill*, 94 Mo. 520, it was held that a bookkeeper might testify, from seeing certain entries in his handwriting, that he was led to think the facts stated in them were true.

In an article in the January and February number, 1900, of the *American Law Review* (volume 34, page 2), entitled *Medical Expert Evidence*, it is said: "In the reception of proof in judicial investigations, the rule is that witnesses are allowed to testify only as to facts, and are not permitted to state their conclusions from facts. An exception is made in favor of experts, however, who, as Mr. Wharton well puts it, ¹²⁰ 'are entitled to give their opinions or judgments as to conclusions from facts within the range of their specialties, but too recalcitrant to be properly comprehended and weighed by ordinary reasoners.' This departure from the prevailing rule in the law of evidence is justified by the necessity of the case."

So in the case at bar, while holding that both defendant and Mrs. Cramer are competent witnesses in the case with respect to the conversations between them in regard to his treatment of her in his professional capacity, and his manner of treat-

ment, what he did, etc., is a departure from the prevailing rule of the law of evidence, we think it is fully justified by the authorities, upon the ground of the necessity of the case.

If the allegations in the petition are true, plaintiff has a cause of action against defendant, but unless Mrs. Cramer is held to be a competent witness and permitted to testify in his behalf, the remedy afforded him by law will fail, and the law should not be so construed as to produce that result.

Moreover, we think Mrs. Cramer is a competent witness in the case on general grounds of public policy, for if it be known that a married woman is a competent witness for her husband in a suit for damages by him against a physician, who produces an abortion upon her without the consent of her husband, in consequence of which her health is injured and he is deprived of her services to which he is entitled by law, and expenses are entailed upon him in her nursing and for medical treatment, it might, to some extent at least, put a stop to such revolting and unnatural practices.

As the knowledge derived by defendant with respect to the condition of plaintiff's wife was privileged on her part, and which she had the right to waive (*Blair v. Chicago etc. R. R. Co.*, 89 Mo. 383; *Thompson v. Ish*, 99 Mo. 160, 17 Am. St. Rep. 552; *Davenport v. Hannibal*, 108 Mo. 471; *Groll v. Tower*, 85 Mo. 249, 55 Am. Rep. 358), it is claimed that she did waive the protection of the statute by offering herself as a witness in behalf of her husband. But the abstract of ¹²¹ the record nowhere shows that she offered herself as a witness, and shows nothing more than that "Mrs. Cramer, being duly sworn on behalf of plaintiff, testified as follows," and that upon objection being made on the part of defendant to her competency she was not permitted to testify. Now, if Mrs. Cramer had been the plaintiff in the suit, she might have offered herself as a witness, but as the suit was by her husband alone, she was at his instance called as a witness, and did not, as we understand the facts, voluntarily offer herself as a witness. Nor does it appear that the plaintiff is representing his wife in this case, or that he was at any time authorized by her to waive this privilege.

Defendant also contends that the bringing of the suit made public that which the statute intended should be kept secret, and that this was a waiver of the statutory protection and privilege. The privilege in this case was to the wife alone, and could not be waived by the husband or any other person,

without authority from her to do so, and there was no evidence in this case that he had any such authority. The institution of the suit by him had no tendency to show that he had any such authority. Moreover, while the law places no restriction upon her or the defendant as to what they may respectively say to others about what occurred between them during his treatment of her, it prohibits him from testifying in any case to such facts, without her consent, unless such consent be waived by her or some person authorized to do so for her. Now, if the suit was by the wife, or by the husband and the wife, against the defendant for physical injury occasioned by his want of knowledge or negligence in her treatment, then the privilege of secrecy on the part of defendant would thereby be waived as to all matters connected with the case and his treatment thereof (*Becknell v. Hosier*, 10 Ind. App. 5), but that is not this case.

Our conclusion is that the judgment should be reversed and the cause remanded.

It is so ordered.

Gantt, P. J., and Sherwood, J., concur.

WITNESSES.—PHYSICIANS AS WITNESSES is the subject of the monographic note to *Thompson v. Ish*, 17 Am. St. Rep. 565-571. See, too, *Foley v. Royal Arcanum*, 151 N. Y. 196, 56 Am. St. Rep. 621; *State v. Smith*, 99 Iowa, 26, 61 Am. St. Rep. 219.

WITNESSES — COMPETENCY OF WIFE.—In an action by a husband against one for carnally debauching his wife and alienating her affections, she is not a competent witness in his behalf: *Reynolds v. Schaffer*, 91 Mich. 494, 30 Am. St. Rep. 492.

McBREEN v. McBREEN.

[154 Missouri, 323.]

HUSBAND AND WIFE — AGREEMENT OF SEPARATION—CURTESY—ESTOPPEL.—A contract entered into between husband and wife, whereby he was to pay her a certain sum of money and she was to join him in deeds of conveyance and relinquish her dower in other lands, and both were to live separate and absolve each other from all obligations as husband and wife, while not enforceable at law, may, after complete performance, be successfully interposed as an equitable defense to an action brought by him to secure possession, as tenant by the curtesy, of property which she subsequently acquired with her own means, although it was not her separate, equitable estate.

HUSBAND AND WIFE—DOWER AND CURTESY—CONTRACT.—A wife may contract for the relinquishment of her dower right in her husband's land in consideration of a tract of land deeded by him to her, and he may make a similar contract with his wife in respect to his interest by the curtesy in land which she then owns or which she may afterward acquire.

HUSBAND AND WIFE—DEED TO WIFE—CURTESY.—In equity an estate may be so limited as to give a wife the inheritance and, by words clearly denoting that intention, to exclude and deprive her husband of curtesy. Hence a deed to a wife granting property "to her sole and separate use, free and clear of any and all marital rights of her present or any husband she may have hereafter," secures to her not merely the rents, issues, and profits in her lifetime, but deprives her husband of all curtesy in the land after her death.

Thomas F. Gatts, for the appellant.

Powell & Powell, for the respondents.

226 **BURGESS, J.** This action is ejectment for the possession of a city lot in Kansas City. The petition is in the usual form. The answer avers that defendants are the children and only heirs at law of Ann McBreen, deceased, who was plaintiff's wife, and that long before she acquired the property in question, she and plaintiff being unable to longer live together because of disagreements, they agreed in writing to separate, she agreeing to relinquish her dower in several lots which he then owned in Kansas City, and he to pay her one thousand dollars in money, give her all the household and kitchen furniture, except a small portion thereof, in consideration for which and upon the performance of the provisions of said agreement the said plaintiff and the said Ann McBreen were absolved from any and all obligations toward each other by reason of their relation as husband and wife, and that the parties released each other from any and all obligations by reason of their marriage. That each party complied with the terms of the agreement, and thereafter lived separate and apart from each other. That thereafter said Ann acquired the lot in question by purchase, etc.

The case was tried by the court, a jury being waived, upon the following agreed statement of facts. That John McBreen and Ann McBreen were husband and wife, and that the defendants are their only children. That John and Ann McBreen, finding it impossible to live together in peace and harmony, did, on the twenty-eighth day of February, 1890, enter into **327** an agreement in writing, by which it was agreed that John should pay his wife Ann the sum of one thousand dollars

in cash, in consideration for which she was to join him in deeds of conveyance, and relinquish her dower in certain other lands which he then owned, and might wish to convey to other parties. The wife was to have all of their household and kitchen furniture, except the furniture of one room, which the husband was to have. It was also agreed that thereafter the parties were to live separate and apart, and absolve each other from all obligations toward each other as husband and wife. That on the twelfth day of November, 1891, Ann McBreen purchased for the price of eleven hundred dollars, from Joseph B. Ganghoff, the lot in question, who executed to her a warranty deed in which it is stated that said Ganghoff, in consideration of eleven hundred dollars to him paid by Ann McBreen, "does by these presents grant, bargain, and sell, convey, and confirm unto Ann McBreen, to her sole and separate use, free and clear of any and all marital rights of her present husband or any husband she may have hereafter, and her heirs and assigns, the following described real estate situate in Jackson county, Missouri, to wit, all of lot 23, block 1, in Graham's addition to Kansas City. To have and to hold the premises aforesaid, with all and singular the rights, privileges, appurtenances, and immunities, to her sole and separate use, free and clear of any and all marital rights of her present husband or any husband she may have hereafter."

Both parties complied with the agreement on their respective parts, Mrs. McBreen, receiving the thousand dollars and the furniture from her husband, and relinquishing by deeds her dower interest in all the lands which he then owned and conveyed to other parties, and he receiving the furniture of one room. The agreement also showed that Mrs. McBreen took possession of said lot at the time of her purchase, and with the defendants remained in possession thereof until her death on May 23, 1895, and that defendants ³²⁸ have been in possession ever since. That the value of the monthly rents and profits of said lot is eleven dollars per month. That John McBreen and his wife Ann were never divorced.

It was said in *Tremmel v. Kleiboldt*, 75 Mo. 258, that: "It is well settled that the husband is entitled to curtesy in all estates of inheritance of which the wife dies seised, either at law or in equity. As to equitable estates, actual possession by the wife, or the receipt by her of the rents, issues, and profits, or possession by a trustee for her benefit, is equivalent to legal seisin, and the limitation of such estates to the sole and sep-

arate use of the wife will not debar the husband from curtesy, as such limitation necessarily terminates upon the death of the wife": Citing *Alexander v. Warrance*, 17 Mo. 228; *Baker v. Nall*, 59 Mo. 265; *Lewin on Trusts*, 622; *Watts v. Ball*, 1 P. Wms. 108; *Parker v. Carter*, 4 Hare, 400; *Morgan v. Morgan*, 5 Madd. 408; *Follett v. Tyrer*, 14 Sim. 125; *Appleton v. Rowley*, L. R. 8 Eq. Cas. 139; *Mullany v. Mullany*, 4 N. J. Eq. 16, 31 Am. Dec. 238; *Cushing v. Blake*, 30 N. J. Eq. 689. The same rule is announced in *Soltan v. Soltan*, 93 Mo. 307, and in *Woodward v. Woodward*, 148 Mo. 247.

It must thence follow that plaintiff is entitled to the possession of the property in question, as tenant by the curtesy, unless by the terms of the deed from Ganghoff to Mrs. McBreen or of the agreement made between him and his wife on February 28, 1890, he is debarred from claiming curtesy in his wife's real estate.

That such a contract as the one between plaintiff and his wife, Ann McBreen, is not enforceable at law is too well settled for discussion, but it does not for that reason follow that it may not be successfully interposed as an equitable defense to an action brought, as in the case in hand, in disregard of its terms and conditions.

The contract between the plaintiff and his wife recites ³²⁹ that, "finding it impossible to live together in peace and harmony, and deeming it to their mutual interest to separate, and live separate and apart, and it being mutually desirous to settle all matters of property between them, etc. . . . And it is further mutually agreed that upon the performance of this agreement the said parties hereto shall be absolved from any and all obligations toward each other by reason of their relation as husband and wife, and the said parties hereto hereby release each other from any and all obligations by reason thereof."

The parties complied literally with the terms of the contract, plaintiff's wife, Ann, joining with her husband in the deeds to the property which he thereafter conveyed away and relinquished her dower in all the real property which he owned at the execution of the contract.

The covenants in the agreement were for the mutual benefit of both parties, and were acted upon by them. Ever after the execution of the agreement the parties lived apart, and the plaintiff was relieved of his wife's support, and upon no principle of equity or good conscience should he now be permitted

to have possession of the property, as tenant by the curtesy, which she afterward acquired with her own means, although it was not her equitable separate estate.

By the terms of his own deliberate and solemn covenants he should be estopped, for otherwise it would be the grossest injustice, to prevent which the doctrine of estoppel may be invoked: *Wallace v. Bassett*, 41 Barb. 92. It would be hard to find a case in which the claim of property is so inconsistent with honesty and fair dealing as is the plaintiff's in this, and if the doctrine of equitable estoppel should be applied in any case it should in this.

While it was not expressly so decided in *Halferty v. Searce*, 135 Mo. 428, there is an implied recognition in that case of the right of husband and wife to contract for the relinquishment of her dower right in her husband's land in ³³⁰ consideration for a tract of land deeded by him to her, and if a wife can make such a contract with her husband, with respect to her dower, it is difficult to see why a husband may not make a similar contract with his wife in respect to his interest by the curtesy, in land which she then owns or which she may afterward acquire.

In that case *Sherwood, J.*, said: "The above case necessarily gives tacit recognition to the idea that a wife possessed of a mere dower right in her husband's land may so contract with him as to make valid a conveyance to her of a tract of his land in consideration of the concurrent relinquishment by her of her dower right in another tract of her husband's land, such relinquishment constituting a consideration for such conveyance to her. This has been the settled law of this state ever since *Caldwell v. Bower*, 17 Mo. 564. See, also, *Woodson v. Pool*, 19 Mo. 340. To the same effect is *Novelty v. Pratt*, 21 Mo. App. 171. Elsewhere this doctrine finds ample support": Citing *Bullard v. Briggs*, 7 Pick. 533, 19 Am. Dec. 292, and cases cited; *Garlick v. Strong*, 3 Paige, 440; *William etc. College v. Powell*, 12 Gratt. 373; *Clerk v. Nettleship*, 2 Lev. 148. He then reviews at considerable length a large number of authorities, to wit, *Livingston v. Livingston*, 2 Johns. Ch. 537, 2 Kent's Commentaries, 14th ed., 166, *Gosden v. Tucker*, 6 Munf. 1, *Wormley v. Wormley*, 98 Ill. 544, *Holloway v. Holloway*, 103 Mo. 274, *Kesner v. Trigg*, 98 U. S. 50, and *McCann v. Letcher*, 8 B. Mon. 320, which clearly show that a married woman may make a contract with her husband in regard to her real property, to which she is seised in fee in her own right,

which a court of equity will enforce, notwithstanding it is not her separate equitable estate. The rule announced in *Shaffer v. Kugler*, 107 Mo. 58, is not supported by a single authority, either court or text-writer, and is directly opposed to the earlier case of *Holloway v. Holloway*, 103 Mo. 274, as well as the other case heretofore cited from ³³¹ 17 Missouri decisions, in which it was held that a wife holding a homestead estate could validly contract in equity with her husband with respect thereto. The transaction between the husband and wife in that case occurred in 1884.

Since writing the above I have found the following decisions of this court, which sustain the views which I have expressed: *Tillman v. Tillman*, 50 Mo. 40; *Chapman v. McIlwrath*, 77 Mo. 46, 46 Am. Rep. 1; *Sloan v. Torry*, 78 Mo. 626. *Shaffer v. Kugler*, 107 Mo. 58, should be overruled.

It also appears from the express terms of the deed from *Ganghoff* to *Ann McBreen* that her husband was excluded from all marital rights in the property in question.

That the general doctrine is correctly stated in *Tremmel v. Kleiboldt*, 75 Mo. 258, we think there can be no doubt, but in that case and in *Alexander v. Warrance*, 17 Mo. 228, *Baker v. Nall*, 59 Mo. 265, *Soltan v. Soltan*, 93 Mo. 307, and *Woodward v. Woodward*, 148 Mo. 247, the deeds simply granted a separate estate to the wife and did not attempt to deprive the husband of his curtesy. Indeed, it is the prevailing doctrine in England and the United States that it is not competent at common law in a grant to a woman of an estate of inheritance to exclude her husband from his right of curtesy, but it is equally well settled that in equity an estate may be so limited as to give the wife the inheritance and, by words clearly denoting that intention, to exclude and deprive the husband of curtesy: *Tiedeman on Real Property*, 2d ed., sec. 105; 1 *Washburn on Real Property*, 5th ed., sec. 15, p. 176; *McTigue v. McTigue*, 116 Mo. 138; *Grimball v. Patton*, 70 Ala. 635; *Rigler v. Cloud*, 14 Pa. St. 361; *Pool v. Blakie*, 53 Ill. 495; *Haight v. Hall*, 74 Wis. 152, 17 Am. St. Rep. 122.

It is agreed that the words of exclusion must clearly indicate an intention to deprive the husband of his curtesy: *Steadman v. Palling*, 3 Atk. 423; *Morgan v. Morgan*, 5 Madd. 410; *Mullany v. Mullany*, 4 N. J. Eq. 16, 31 Am. Dec. 238; ³³³ *Dubs v. Dubs*, 31 Pa. St. 149. With the common law thus settled, let us recur now to the deed under which plaintiff asserts a right to curtesy in his wife's land.

The granting clause is "to her sole and separate use, free and clear of any and all marital rights of her present or any husband she may have hereafter."

Now it is clear that curtesy is a marital right. It is an estate conferred by the law, not by grant, as an incident of marriage. No right growing out of marriage can better be denominated a marital right. This deed then secured to Mrs. McBreen not merely the rents, issues, and products in her lifetime of this land, but in plain, clear, explicit words deprived her husband of any and all marital rights. Can it be doubted that the deed itself was intentionally so limited to deprive plaintiff of an estate by curtesy in this land? I think most clearly not.

And it is entirely permissible to consider the then existing relations of the parties and the contract read in evidence, in pursuance of which Mrs. McBreen not only agreed but actually relinquished by proper deeds all her dower interest in his lands.

The judgment should be affirmed, and it is so ordered.

Gantt, P. J., concurs, in a separate opinion.

Sherwood, J., concurs in the opinion.

GANTT, P. J. I concur in affirming the judgment on the ground that the deed to Mrs. McBreen in my opinion clearly excludes the curtesy of her husband, but I dissent from so much of the opinion as criticises and seeks to overrule the decision of the court in *Bank in Shaffer v. Kugler*, 107 Mo. 58.

HUSBAND AND WIFE—RELEASE OF PROPERTY RIGHTS.—Where a husband and wife have ceased to live together, agreements between them and a trustee, recognizing their inability to live together, and making provision for their property rights and interests, are generally enforced, and by such an agreement either spouse may relinquish his or her interest in the property of the other, both present and prospective: See the monographic note to *In re Ingram*, 12 Am. St. Rep. 92. If a feme covert, having all the powers of a feme sole, agrees in writing, for a valuable consideration, to release her dower in land, she is thereafter estopped to claim dower therein: See the monographic note to *Trimble v. State*, 57 Am. St. Rep. 172.

STATE EX REL. WYATT v. ASHBROOK.

[154 Missouri, 375.]

MANDAMUS—MERCHANT'S LICENSE.—Where all the requirements of law preliminary to acquiring a license to conduct a business have been complied with by a merchant, the issuance of such license, if refused, may be compelled by mandamus, since such duty is merely ministerial.

POLICE POWER.—TO SUSTAIN AN ACT OF LEGISLATION as a police measure, its object must to some degree tend toward the prevention of some offense or manifest evil, or have for its aim the preservation of the public health, morals, safety, or welfare.

POLICE POWER — LICENSE FEE — REGULATING TRADE.—A statute under the title "of an act to regulate business and trade," which allows any person to engage in the business designated by the act by the mere payment of a license fee, but which provides no police inspection, supervision, or regulation, is not a police measure; the act simply imposes a license fee.

CONSTITUTIONAL LAW — TAXATION. — "AN ACT TO REGULATE BUSINESS AND TRADE in cities," which imposes a direct tax upon department stores as a license, and which provides that two-thirds of the tax shall be paid into the city treasury, is violative of a constitutional provision which declares that the legislature shall not impose taxes on cities or other municipal corporations, or upon the inhabitants or property thereof, for city or other municipal purposes, but may, "by general laws, vest in the corporate authorities the power to assess and collect taxes for such purposes," since it undertakes to impose a direct tax upon a business occupation for city purposes.

CONSTITUTIONAL LAW—TAXATION—POWER OF LEGISLATURE.—Under a constitutional provision which declares that the legislature shall not impose taxes upon cities or upon the inhabitants or property thereof for city purposes, the legislature cannot itself, or through the agency of commissioners, any more impose a tax directly upon an occupation or business in cities for city purposes, than it can directly impose taxes upon city property for city purposes.

CONSTITUTIONAL LAW—GIVING AWAY TAXES.—If a tax imposed by a statute is a state tax, the legislature has no authority to give or remit any part of it to a city.

CONSTITUTIONAL LAW—DELEGATING TAXING POWER TO COMMISSIONER.—An undetermined tax is in law no tax; hence an act which empowers a commissioner to fix a license tax anywhere between a minimum and maximum amount, such fee to be uniform in each city, is unconstitutional, as being a delegation to such commissioner of the power to fix the amount of the tax.

CONSTITUTIONAL LAW — UNIFORM TAXATION — DEPARTMENT STORES.—Under a constitutional provision that taxes "shall be uniform upon the same class of subjects," an act which imposes upon merchants conducting department stores in cities of fifty thousand inhabitants or more a tax, the amount of which, between certain limits, is fixed by a different commissioner for each city, is unconstitutional, since all merchants of that class are not necessarily subject to the same uniform rate of taxation.

CONSTITUTIONAL LAW — ACT VOID FOR UNCERTAINTY.—An act which imposes a license tax upon merchants who conduct department stores, but which fails to define the life and duration of the license to be issued, is void for uncertainty.

CONSTITUTIONAL LAW — DEPARTMENT STORES — CLASS LEGISLATION.—An act which imposes a license tax on all persons and corporations who conduct department stores for the sale of more than one class or group of goods is class legislation, by making an arbitrary and unreasonable classification of merchants, and is unconstitutional, since it infringes on the right of the citizen to the enjoyment of the gains of his industry, and deprives him of liberty and property without due process of law.

Culver & Phillip, for the appellants.

B. R. Vineyard and F. N. Judson, for the respondent.

381 ROBINSON, J. This is a proceeding by mandamus, commenced by the relator in the Buchanan circuit court, for the purpose of compelling the auditor, treasurer, and comptroller of the city of St. Joseph, the defendants herein, to issue to him a merchant's license to conduct a department store in said city. The defendants had refused to issue the license applied for, unless the relator would first pay into the city treasury two-thirds and into the state treasury one-third of the amount required to be so paid by section 6 of what is known as the anti-department store act, approved May 16, 1899 (*Laws 1899, p. 72*), in addition to the tax imposed by the general laws of the city for a merchant's license.

In the alternative writ, which follows in detail the allegations of the petition therefor, the laws and ordinances of **382** the city of St. Joseph, prescribing the various requirements necessary to be followed in order to secure a merchant's license, are set forth. The writ then shows that the relator complied with all these requirements in his application for a license, and it was refused by the defendants on the sole ground, as shown in the writ, that he had not paid into the state and city treasury the license fees required by the act referred to, in addition to the ad valorem tax required of all merchants under the general laws of the city, and which the relator has tendered in connection with his application. The writ further shows that in his application for the license, the relator clearly indicated that he desired the license to conduct a department store within the city for the sale of five different classes or departments of goods as defined by said act. It shows that he intended to sell the goods at retail and through twenty clerks or employes engaged by him for that purpose;

that the relator filed his application for the license desired by him with the defendant Ashbrook as city auditor on September 15, 1899, one hundred and twenty-two days after the passage and approval of the act in question, ignoring its provisions, tendering the license fee under the general levy made by the city for taxes, and demanding of the defendants and each of them that they perform the acts required by the general laws and ordinances of the city, when a merchant's license is applied for, and which are set forth in the alternative writ of mandamus. The alternative writ also shows that the license was refused by defendants solely on the ground that relator had not complied with the provisions of said act.

For a return to the alternative writ, the defendants filed a demurrer, alleging as grounds therefor that the matters and things set forth in the alternative writ are not sufficient in law or equity to entitle the plaintiff to the relief asked for, or to authorize the issuing of a writ of mandamus.

The court below overruled said demurrer, and in its decree specially held the act under consideration to be unconstitutional and void. The defendants declined to plead further, and the court thereupon rendered final decree for the plaintiff, and directed the issuance of a peremptory writ of mandamus, commanding the defendants and each of them to do and perform the acts and things required conditionally by the alternative writ, and which were necessary to be performed in the issuance of the license applied for by the relator.

From this final decree, the defendants have appealed to this court. The only question involved in this controversy is as to whether this act, known as the anti-department store law, a brief synopsis of which is given below, is operative or constitutional.

By section 1 of the act, all goods, wares, and merchandise in the cities to which it now applies are divided into seventy-three classes, and these classes are then rearranged into twenty-eight groups or departments. By section 2 of the act from and after one hundred and twenty days after its passage, it is made unlawful for any person or persons, firm, corporation, or association of persons to have on hand for sale, sell or expose for sale at retail, any goods, wares, and merchandise of more than one of these several classes or groups, without first having obtained a license therefor, as provided for in the act.

By section 3 it is provided that during the one hundred and twenty days from the passage of the act, the board of officers

of the city charged with the duty of issuing merchant's licenses, and after that a license commissioner for each city to be appointed by the governor, are authorized to issue merchants' licenses. By a proviso in this section, the act is limited in its application to such cities of the state as have or may hereafter have fifty thousand inhabitants or more. By section 4, the applicant for license is required to state the class or group under which he proposes to conduct his business, and also ^{and} state what additional class or group, or what additional article or articles in any class or group, he desires to keep or sell, and also the street number at which he proposes to conduct his business.

By section 5, the board or license commissioner, charged with the duty of issuing licenses, is empowered to fix the sum to be paid for licenses required by the act, but which sum is not to be fixed at less than three hundred dollars nor more than five hundred dollars for every class or group or for any particular article of any class or group named in the application, in addition to the principal business to be conducted by the applicant. The license fee thus fixed is to be uniform in each city. Section 6 prohibits the issuance of any license until the applicant shall have paid into the city treasury two-thirds and into the state treasury one-third of the amount required to secure the license. Section 7 provides a punishment by imprisonment in the county jail for a term not exceeding one year, and the payment of a fine of not less than one hundred dollars nor more than five hundred dollars, for the violation of any provision of the act, and makes each day's violation a new offense. Section 8 provides that the act "shall not apply to manufacturing establishments, warehouses, or auction houses or to any establishment where not more than fifteen persons are employed."

No question is made here by respondent as to the right of relator to compel by mandamus the issuance to him of the license applied for if the act known as the anti-department store bill is unconstitutional or inoperative as declared by the circuit court in its disposition of the case. The duty of respondents being clearly ministerial, where all the requirements of the law preliminary to acquiring a license have been complied with by relator, its issuance if refused was properly compellable by mandamus. And it might further be added that no question ought to be raised as to the character of the imposition levied by the act, notwithstanding it is called a "li-

cense fee," and the act imposing it is designated, "an act ³⁸⁵ to regulate business and trade in cities having a population of fifty thousand inhabitants or over, etc." Courts look beyond the mere title of an act to see and determine its real object, purpose and result, and where the power of taxation therein provided for is exercised for the mere purpose of revenue or undue restraint or prohibition, as is most manifest in the act in question, its designation as "license fee" will not save it from the constitutional restrictions that would apply to it as the imposition of a tax. In no sense can this most extraordinary act be regarded as a police measure, and consequently does not fall within the protection of the police power. It nowhere attempts to protect any public interest or defend against any public wrong. It shows upon its face that regulation is not its purpose, but that revenue, or undue restriction, in the interest of others not embraced in the class designated, is the aim in view. While a most onerous license fee by name is imposed, no police inspection, supervision, or regulation is provided, nor is any standard set for the applicant to establish, or that he agrees to attain or maintain, but any and all persons engaged in the business designated in the act, without qualification or hindrance, may come, and a license on payment of the stipulated sum to the commissioner named in the act, will issue, to do business, subject to no prescribed rule of conduct and under no guardian eye, but according to the unrestrained judgment or fancy of the applicant and licensee. The applicant is simply required to pay his money and take out his license. That is the beginning and the ending of the police supervision and control over him or his business so far as concerns the act in question.

In order to sustain legislation of the character of the act in question, as a police measure, the courts must be able to see that its object to some degree tends toward the prevention of some offense or manifest evil, or has for its aim the preservation of the public health, morals, safety, or welfare. ³⁸⁶ If no such object is discernible, but the mere guise and masquerade of public control, under the name "of an act to regulate business and trade," etc., is adopted, that the liberty and property rights of the citizens may be invaded, the court will strike down the act as unwarranted. Mere legislative assumption of the right to direct and indicate the channel and course into which the private energies of the citizen shall flow, or the attempt to abridge or hamper his right to pur-

sue any lawful calling or avocation which he may choose without unreasonable regulation or molestation, have ever been condemned in all free government.

No suggestion is made by counsel in their effort to sustain this act, and to our mind none can be conjectured, why the selling of any or all of the articles of merchandise embraced in two or more of the classes or groups designated therein, in one store or building, under one head or unit of management, when fifteen or more persons are employed, is a thing of danger to the public, or that the morals, health, safety, or comfort of the community will to any extent be injured or prejudiced thereby, in any manner different or greater than would result if the same articles were sold in different store buildings run by the same person, corporation, or company as independent establishments and each employing fifteen or more persons, or when all of the enumerated articles are sold in one store, wherein less than fifteen persons are employed. If the selling of the different articles enumerated in any one of the classes or groups designated by the act is innocent and harmless when pursued separately as a business, how does it become harmful and dangerous merely because the articles in two or more classes or groups designated in the act, become united for sale under one unit of management and conducted in one building where fifteen or more persons are employed that would call for special legislation with increased and onerous license fees or tax burdens imposed. Such grouping together for sale or disposition ³⁸⁷ of those articles of daily use and necessity do not endanger or threaten the peace and good order of society. They neither engender disease, spread contagion, corrupt the morals, or encourage dissipation or vice in any form because of such combination, and no sanction for such reasons can be found for the act, as a public measure.

As said above, the act, though entitled "an act to regulate business and trade in cities having a population of fifty thousand inhabitants and over," is clearly an exercise of the power of taxation and must be enforced, if at all, under and according to the constitutional limitations and restrictions on the subject of taxation. Conceding that the legislature is not limited to any form of taxation, and that it may impose a license tax as well as a direct tax upon the department store merchant, and further treating the imposition provided in the act in question as a tax imposed direct by the legisla-

ture, and not a delegation of power to the commissioner therein named, to fix an uncertain and varying sum between three hundred dollars and five hundred dollars as his fancy may suggest (which the relator in this case most strenuously contends is done), then the tax to be paid under the act in question is violative of the provision of section 10 of article 10 of our constitution, which declares that "the general assembly shall not impose taxes upon counties, cities, towns, or other municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may, by general laws, vest in the corporate authorities the power to assess and collect taxes for such purposes." By section 1 of the same article it is further provided that "the taxing power may be exercised by the general assembly for state purposes, and by counties and other municipal corporations, under authority granted to them by the general assembly, for county and other corporate purposes."

Section 6 of the act in question provides that: "No such license shall be issued until the person, firm, corporation, ~~see~~ or association of persons applying therefor shall pay to the city treasurer of the city two-thirds and into the state treasury one-third of the amount fixed by the board or officer receiving such application, as due and payable therefor." While the legislature might authorize the municipality to be affected by the act in question, as it has done in the city charters and in the general laws regulating the incorporation of cities, to license and tax certain corporations and callings, and to impose taxes on all the property within its limits for municipal purposes, it cannot itself, or through the agency of the commissioners to be appointed under the act, any more impose such tax directly upon such occupation or business in cities for city purposes than it can directly impose taxes upon city property for city purposes. As will be seen by section 6 of the act in question, two-thirds of the license fee or tax imposed thereunder upon the department store merchant is to be paid to the treasurer of the city wherein such store is located, and goes into the city treasury for city purposes, while the remaining one-third of the tax named is to be paid into the state treasury for the use of the state, whereas section 10 of article 10 of the constitution, above quoted, expressly inhibits the general assembly from imposing taxes upon cities or other municipal corporations, or upon the inhabitants or property thereof for city or other municipal pur-

poses, and directs that by general laws it may vest in the corporate authorities thereof power to so assess and collect all taxes for corporate purposes. Section 1 of said article 10 of the constitution is likewise mandatory in directing how the taxing power may be exercised by the general assembly and by the cities and municipal corporations of our state, and excludes the assertion of authority attempted by the act in question. And, again, it might be suggested that as part of the imposition provided for in section 6 of the act in question is a city tax, the state not only was wanting in authority to impose it upon the city or the inhabitants ~~see~~ or property thereof, but to appropriate any part to itself, and if the imposition be treated as a state tax the legislature had no right to give or remit any part of the state's revenue to the city.

But, aside from the question as to whether the tax to be imposed be considered as a municipal or state tax that should have been imposed by the legislature of the state or by the cities of the state, relators insist that the act is vitally defective, in that it delegates to the commissioner named in the act to be appointed by the governor the power to fix the amount of the license fee or tax, and for that reason violates section 1 of article 10 of the constitution.

By section 5 of this act it is provided that "the said board or officer in any such city charged with the duty of issuing merchant's licenses shall have power to fix the sum to be paid for licenses required by this act, but such license fee shall not be fixed at less than three nor more than five hundred dollars for every class or group, or for any particular article of any class or group mentioned in the application for such license," etc. While a minimum below which and a maximum above which the commissioner cannot go has been designated in the act, the authority to name and fix the amount of the imposition between these designated sums is plainly delegated to the commissioner, and can be exercised according to his arbitrary discretion in the premises, subject only to the qualification, as further set out in the section, "that the license fee exacted shall be uniform in each city in which it is collected." Until the commissioner acts and determines upon the rate of the imposition to be levied within the limits of the city for which he is appointed, no one of that community can determine from the law itself what the license fee or tax is or will be; until he acts, the rate of the tax is an unknown quantity. In fact, until he acts there is no tax provided. An

undetermined tax is in law no tax. The determination of the amount or rate of a ³⁹⁰ tax to be imposed is as essential in exercise of the taxing power as the designation of the property to be taxed or the time for its collection or enforcement.

And here, again, on account of the delegated authority to the commissioner, to be named under the act, to fix the sum to be paid for the license therein required, the further objection is urged to it that it is violative of the uniformity clause of our state constitution, which by section 3 of article 10 provides that all taxes to be levied and collected for public purposes "shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general law." Ignoring for the present the question that the merchant doing business in the cities of our state having a population of fifty thousand inhabitants or more, in one store or building when fifteen or more persons are employed, have been arbitrarily singled out by this act as a class to themselves, that additional burdens might be imposed upon them from which all other merchants of the state are exempted, all of the class of merchants thus arbitrarily named, under this act, are not subject to the same uniform rate of tax. Even as to them the tax may vary according to the whim and fancy of the different commissioners to be named by the governor for the different cities, as will be seen from a reading of the act.

The merchant in St. Joseph, for selling the articles enumerated in each of the classes or groups designated in the act (more than one), may be required to pay three hundred dollars, while for selling the same articles in Kansas City his brother department store merchant may be required to pay four hundred dollars, and the merchant of St. Louis be required to pay five hundred dollars, and all under the same act, and where a part of the tax to be collected from each goes to the same common public purpose. So the practical operation of the act in question not only ³⁹¹ makes an arbitrary class of merchants in cities of fifty thousand inhabitants or more, doing a retail business under one unit of management where fifteen or more persons are employed, as contradistinguished from all other merchants of such cities, and all other merchants of the state outside of cities of fifty thousand inhabitants or more, whether conducting business under the same condition as those designated in the class defined by the act or otherwise, but all merchants of that class are not nec-

essarily subject to the same uniform rate of taxation, since the rate between three and five hundred dollars is to be fixed and determined according to the discretion of the different commissioners to be appointed for the various cities, coming within the influence of the act.

But the inequality and want of uniformity in the matter of the application of the act, to the merchant of the designated class, is made more striking when it is suggested that under it the commissioner (say for the city of St. Joseph) may determine that he will require a license fee for selling the articles classified and enumerated under each one of the twenty-eight groups of articles designated in the act to be kept and sold by the merchant of that city (less the articles named in any one group, which he may sell without the requirement of a license), and then the highest license fee that would be required in that city for selling all articles of merchandise enumerated in the act would be three hundred times twenty-seven, or eight thousand one hundred dollars. While in St. Louis, perhaps, the commissioner appointed to look after the interest of that city, being a man of more comprehensive views and of a disposition to give to the act a more liberal and far-reaching interpretation, to meet the financial pressing needs of that city, and being a man of bolder financial reach, might determine that a license fee for each of the seventy-three classes of articles enumerated in the act was required, and would further fix five hundred dollars as the amount of the license fee to be imposed for the selling of articles of each class, over and above the articles of one class that can be ³⁹² sold without a license. Then we would have the merchant of that city, for conducting the same business as the St. Joseph merchant, paying for his license seventy-two times five hundred, or the enormous sum of thirty-six thousand dollars, thus making the possible astounding difference of twenty-seven thousand nine hundred dollars between the amounts to be paid by merchants arbitrarily created by this act, for the mere purpose that they might be legislated against.

Thus it is seen that the uniformity clause of the constitution has been violated in this act, not only by the arbitrary and unreasonable classification of merchants of a natural class, for the particular purpose of this particular imposition, and also on account of the discretion given to the commissioner to be named under the act to fix, in different cities, different license fees or rates of taxation upon the merchants of the

same designated class; but the very uncertainty in the language of the act has introduced another element of possible and probable inequality and want of uniformity in the matter of determining the amount of the tax to be fixed and imposed.

In the exercise of the taxing power, which is the very essence of sovereignty, and of the gravest consequences to the citizen, there ought to be no ambiguity or uncertainty in the language of the law. An act which attempts to levy such burdensome taxation as that provided in the act in question should at last be plain and past all misunderstanding as to the basis on which the computation is to be made, and yet from a reading of the act no one can tell whether for the selling or exposing for sale, by a merchant of the designated class, all the different articles of goods, wares, and merchandise enumerated therein, a license fee or tax is to be exacted for selling or exposing to sale the articles named in each of the seventy-three classes, or only the twenty-eight groups of articles.

Section 5 of the act provides that a license fee shall be ~~see~~ fixed at not less than three hundred nor more than five hundred dollars "for every class or group, or for any particular article of any class or group mentioned in the application for such license." The words "class" and "group" are used together throughout the act as "class or group," and nothing is to be found therein to indicate which is to be considered, or what is to be rejected or ignored, in the matter of computing the amount of license fee to be collected by the commissioner called upon to execute the act. As to whether a license fee is intended to be exacted for selling the articles of each of the seventy-three classes or for only each of the twenty-eight groups of articles is a matter of pure guesswork, a thing of blind conjecture, a foundation too uncertain and untenable upon which to rest the cumbrous tax imposition provided in the act.

But the uncertainty as to the meaning of the act is not only made to appear from the use of irreconcilable words and language found therein, but also on account of the absence of proper words therein defining the life and duration of the license to be issued by the terms of the act. Whether the license provided for in the act is to issue and run for a day, month, or a year, or for life of the applicant, or for the duration of his business at a fixed place, nothing is to be

found in the act to inform one, and again we are driven to the field of conjecture and speculation, without data upon which to predicate a construction as to what is meant. We know of no rule of construction that would justify this court giving to this act a definite meaning not somewhere disclosed or indicated within its four corners. The act is clearly void for uncertainty.

But independent of all these objections to the form and structure of the act, to the mode, manner and amount of the attempted imposition, or as to whether the imposition be treated as a tax or a license, the act is further assailed upon the broad constitutional ground that, as unwarranted class legislation, it is violative of the natural rights of the citizen ²⁸⁴ defined in section 4 of article 2 of our constitution (bill of rights), which declares "that all persons have a natural right to life, liberty, and the enjoyment of the gains of their industry," and of section 30 of the same article, which declares "that no person shall be deprived of life, liberty, or property without due process of law."

The protection of liberty and of property, defined in section 4 of the constitution, *supra*, "as the gains of one's industry," are among the principal objects for which free government among men has been established, and it is further declared in the closing paragraph of said section, "that when government does not confer this security it fails of its chief design"; and of these rights no person shall be deprived without "due process of law," which means, as declared by this as by all courts of the land to be, "the law of the land," and these words, when having reference to legislative enactments, must mean a requirement of action or abstinence, binding upon and affecting alike each and every member of the community of the same class or of similar circumstances, enacted for the general public good or welfare. Does the act in question, by the imposition of the license fee provided for therein, infringe upon the liberty of the citizen whom it is to affect, or of his right to the enjoyment of the gains of his industry, or its equivalent, his property?

If the terms "life," "liberty," and "property," as used in the constitution, are "representative terms and cover every right to which a member of the body politic is entitled under the law," as said by Sherwood, J., in *State v. Julow*, 129 Mo. 172, and that within this comprehensive scope are embraced the right to buy and sell as others may, and to pursue such honest

calling, vocation, or business as the citizen may choose, subject only to such restraints or the imposition of such burdens as may be required or imposed for the general good, and if "due process of law" is to be defined as "the law of the land," designed to protect and ³⁹⁶ preserve the rights of the citizen against arbitrary legislation as well as against arbitrary executive or judicial action, then "due process of law" is denied when any particular person of a class or of the community, are singled out for the imposition of restraints or burdens not imposed upon and to be borne by all of the class, or of the community at large, unless the imposition or restraint be based upon existing distinctions that differentiate the particular individuals of the class to be affected from the body of the community; and this question as to whether the persons thus designated constitute a natural or a reasonable class depends upon facts which the court passing upon the validity or invalidity of the legislation must determine upon. While the legislature under its vested authority and power may arbitrarily impose taxes, restraints, and burdens of various kinds, within the constitutional limitations prescribed, that may become most onerous and oppressive to the citizen, which the courts can do naught but uphold, it cannot create conditions or fiat classes that will operate to make legislation alone applicable to those artificial conditions and classes as general law within the meaning of the constitution, or that will entitle it to the designation of "the law of the land," or that will make the act "due process of law," by which alone the liberty of the citizens may be restrained, or his property burdened or disposed of. As said above, no reason has been given or suggested, and to our minds none can be conceived, why the arbitrary selection of persons and corporations having or exposing for sale (in the same store or building under a unit of management or superintendency, at retail, in the cities of the state having a population of fifty thousand inhabitants), any articles of goods, wares, or merchandise, set out and named in section 1 of the act in question, of more than one of the several classifications or groups therein designated, when fifteen or more persons are employed, was named or made, for the imposition of the license fee provided ³⁹⁶ in the act, from which all other persons and merchants of the state are exempted. It is classified wholly without reason or necessity. It is so arbitrary and unreasonable as to defy suggestion to the contrary. The simple statement of its creation is a most

fatal blow to its continued existence. It is truly "classification run wild." It is special legislation unrestrained. To have made the act apply to all merchants of a given avoirdupois or to those employing clerks of a designated stature, or to those doing business in buildings of a special architectural design, would have been as natural and as reasonable a classification for the purpose in view as the classification made by this act.

It follows from what has been said that the judgment of the circuit court directing the issuance of the peremptory writ of mandamus should be affirmed, and it is so ordered.

Gantt, P. J., Brace and Valliant, JJ., concur.

Burgess, J., concurs in the result; Marshall, J., specially.

Sherwood, J., not being present at the hearing, takes no part in the decision.

MARSHALL, J. I agree to the affirmance of the judgment of the trial court upon the grounds: 1. That the act considered is clearly class legislation and therefore unconstitutional; and 2. That the act is incomplete and is not a law and does not constitute a rule of conduct, and is therefore void. I do not agree that what is commonly termed an occupation tax, which, properly expressed, means a license or permission to do business, is in any proper sense a tax. Such license fees have always been held constitutional in Missouri and elsewhere, provided they apply equally to all persons similarly situated.

POLICE POWER.—TO SUSTAIN LEGISLATIVE interference with the business of the citizen by virtue of the police power, it must tend in some degree toward the prevention of offenses, or the preservation of the public health, morals, safety, or welfare: *Chicago v. Netcher*, 183 Ill. 104, 75 Am. St. Rep. 93.

A LICENSE IS ISSUED under the police power, but the exaction of a license fee, with a view to revenue, is an exercise of the power of taxation: See the monographic note to *People v. Naglee*, 52 Am. Dec. 331-335. The subject of licenses is also treated in the notes to *State v. Conlon*, 48 Am. St. Rep. 236, 237; *State v. Long*, 59 Am. Rep. 267-282.

TAXATION.—DELEGATION OF THE POWER of taxation is the subject of the monographic note to *Mayor etc. v. State*, 74 Am. Dec. 590-595. See, also, *Whiting v. West Point*, 88 Va. 905, 29 Am. St. Rep. 750.

TAXATION.—FOR WHAT PURPOSE taxes may be imposed, see the monographic notes to *Zigler v. Menges*, 16 Am. St. Rep. 365-371; *Buck v. Miller*, 62 Am. St. Rep. 448-477.

ON CLASS LEGISLATION, see the monographic notes to *State v. Ellet*, 21 Am. St. Rep. 780-789; *State v. Goodwill*, 25 Am. St. Rep. 883-885.

SHEA v. SHEA.

[154 Missouri, 599.]

JURISDICTION — ACTION AGAINST DEAD DEFENDANT.—An action begun and prosecuted against a defendant who was dead when it was begun is absolutely void, and can be attacked collaterally as well as directly.

ATTACHMENT — JURISDICTION. — In attachment causes the jurisdiction over the subject matter is obtained by a levy thereon of a writ properly issued, and no matter what nor how great errors or irregularities may subsequently occur the res remains still in the grasp of the court, and its judgment in regard thereto will be valid and binding until reversed on error or appeal or set aside in a direct and appropriate proceeding for that purpose.

ATTACHMENT — JURISDICTION — DEATH OF DEFENDANT.—Where property is seized under a writ of attachment prior to the defendant's death, but the publication of summons is not completed until after his death, the judgment made in such suit in ignorance of the defendant's death is not void, and hence is not open to collateral attack.

EJECTMENT — ESTOPPEL. — Where the defendant in an ejectment suit bought the lands in good faith and went into possession, and for a long period of years exercised all the acts of ownership over them, and made valuable improvements thereon, and paid the taxes, with the knowledge of the plaintiffs, who during all that time claimed title to the premises, such plaintiffs are estopped from asserting title against the defendant, although the deeds under which she claims are void.

Rechow & Pufahl, for the appellant.

Ross & Sea, for the respondents.

⁶⁰¹ **GANTT, P. J.** This is an action of ejectment for certain lands in Polk county, Missouri.

The plaintiffs are four of the nine children and grantees of Patrick Shea, late of said county. The defendant is in possession of said lands under sheriff's deeds to said lands under judgments rendered against said Patrick Shea. The answer is a general denial and an equitable estoppel. Judgment was rendered for plaintiffs for four-ninths of the land, and defendant appeals.

The facts developed on the trial were these: Patrick Shea, the common source of title, moved to Polk county some time prior to the year 1878. He came from Kentucky. He was a married man and left a wife in Kentucky, by whom he had eight children. Mrs. Louisa E. Shea, believing him to be a single man, was married to him in Polk county and had by him one child, a daughter, named Nora Shea, sixteen years

old at the time of the trial in the circuit court. In the spring of 1887 a man representing Patrick Shea's wife in Kentucky came to Polk county to investigate his affairs.

That visit and some papers found by Mrs. Louisa Shea about that time developed that he had a wife living in Kentucky from whom he had never been divorced when he married Mrs. Louisa E. Shea, the defendant herein. By the assistance of Louisa E. Shea, Patrick had accumulated some four hundred acres of land, worth four dollars to six dollars per acre, and money and personal property to the amount of twelve thousand dollars. Alarmed at the prospect of an indictment for bigamy, Patrick Shea rapidly sold off his personal property and collected and sold his notes through the assistance of his grown son, John Shea.

Mrs. Louisa E. Shea, upon learning that she was not the lawful wife, commenced an action by attachment against Patrick Shea to annul her marriage to him and for alimony, and also in a second count for damages in the sum of two thousand five hundred dollars based upon her services to him for nine years, induced by his fraudulent conduct and the concealment of his prior marriage. The petition was filed March 20, 1887. An affidavit was filed charging said Patrick with having absconded and absented himself from his usual place of abode, so that the ordinary process of law could not be served on him, and with removing his property and effects out of this state to hinder, defraud, and delay his creditors, and that the damages for which Mrs. Shea was suing were for injuries arising from his commission of a felony, to wit, bigamy. A bond for five thousand dollars was given and approved and the land in suit was duly attached on the twenty-first day of March, 1888, and an abstract duly filed on the same day in the recorder's office. Publication was made as required by law. At the May term, 1888, judgment was rendered for plaintiff for fifteen hundred dollars damages, sustaining the attachment and awarding a special execution. Execution issued and the land was sold and Mrs. Louisa E. Shea became the purchaser and received a sheriff's deed to the land October 31, 1888, and a second sheriff's deed on May 2, 1890, for the same premises under another judgment by attachment for three hundred and eighteen dollars, for moneys of said Louisa which said Patrick owed her. Patrick so effectually disposed of his personal property that nothing of consequence was realized on the attachments from that source.

It is conceded that the deed to his children, the plaintiffs, under which they claim title was voluntary and without other consideration than love and affection. Indeed, Mr. Ross, who drew the deed, testified it was executed because Patrick was threatened with a prosecution and his wife in Kentucky was demanding five thousand dollars. None of the children were present when the deed was made. It was made and handed to Mr. Ross for them. It is not pretended any consideration was paid or intended to be paid. Ross was not the agent of the heirs. Either he or John Shea put the deed to record. John did not represent the heirs in getting the deeds.

Having disposed of his property Patrick Shea went to Canada. He died at Windsor, Canada, March 30, 1888.

The court gave declarations for plaintiffs, over defendant's objections, as follows: "1. If the court finds for plaintiffs, it will find the amount due each as damages and rents in accordance with his or her interest from the time of the commencement of this action; 2. It is admitted that both plaintiffs and defendant, Louisa E. Shea, claim title to the land in controversy under the same person, Patrick Shea; 3. If the defendant, Patrick Shea, was dead at the time of the trial and rendition of the judgment upon which the first sheriff's deed offered in evidence by defendant was founded, the deed so offered is void and conveyed no title; 4. If the suit was instituted, the judgment rendered, and the whole proceedings had after the death of Patrick Shea, the defendant therein, in the cause wherein the second deed offered by defendant was founded, such judgment proceedings and the deed thereunder were void and the deed conveys no title."

604 To which action of the court in giving said declarations of law the defendants then and there duly objected and excepted at the time.

The defendants asked the court to give the following declarations of law: "1. If the defendant bought the lands in controversy in good faith, and went into possession or retained possession, and for a long period of years exercised all the acts of ownership over the same, and made valuable and lasting improvements thereon, and paid all the taxes, with the knowledge of the plaintiffs, or some of them, and they knew that they claimed the title to said premises that they are now trying to assert during all that time, then they are estopped from asserting such title as against her, even if the title under which she claimed was void; 2. If the defendant, Mrs.

Shea, was the legal wife of Patrick Shea, and as such filed her claim of homestead, then the said Patrick Shea was divested of any power to convey the same and any attempted conveyance of the same was void; 3. The court declares the law to be that if it appears that defendant, Nora Shea, is a minor, and is in possession of the homestead in connection with her mother, then as to that there can be no recovery in this action; 4. The court declares the law to be that the proceedings which culminated in the judgment of May 2, 1888, in evidence, in which Louisa E. Shea was plaintiff and Patrick Shea defendant, even if it was rendered after the death of Patrick Shea, is not subject to collateral attack, and the deed in evidence made upon an execution sale thereunder conveyed the title of said Patrick Shea as of the time of the levy of the writ of attachment in said cause, and the issues must be found for the defendant."

The court gave those numbered 1, 2, and 3, and refused instruction numbered 4, and defendant duly excepted. The verdict and judgment was for plaintiffs for four-ninths ~~of~~ of two hundred and eighty acres of the land, and for damages and monthly rents and profits.

1. If the defendant, Mrs. Louisa E. Shea, acquired title by her sheriff's deeds, or either of them, from the sheriff of Polk county on her attachment suits, it will be unnecessary to consider the other defenses tendered by her, however meritorious they may be.

The plaintiffs' instructions, taken with the instruction numbered 4, asked by defendant, very clearly indicate the ground on which the battle was fought in the circuit court.

The plaintiffs insisted that the defendant's action against Patrick Shea was commenced and prosecuted to judgment after the death of Patrick Shea, and the judgment and the deeds thereunder were for that reason void, whereas defendant contended her action was commenced and her attachment levied in the lifetime of said Patrick, and prosecuted to final judgment in ignorance of his death, and her judgment was not void, and, if not, was not open to collateral attack in this action of ejectment.

By reference to the statement already made it is to be observed that the petition of Mrs. Louisa E. Shea against Patrick Shea was filed in the clerk's office on March 20, 1887, and a writ of attachment sued out, under which the sheriff summoned various debtors of Patrick Shea as garnishees, but,

as it turned out, these parties had either paid their debts to him or their notes were negotiable, and Patrick Shea had indorsed them to persons unknown, and little, if anything, was realized thereon.

Thereupon an additional writ of attachment was sued out by virtue of the statutes, section 534 et seq., on the seventeenth day of March, 1888, by virtue of which the sheriff of Polk county on March 21, 1888, levied upon and seized the lands in suit, and an order of publication having been made notifying Patrick Shea of the commencement of said suit and duly published, judgment was rendered on May 1, 1888, sustaining said ~~see~~ attachment and awarding plaintiff therein judgment for fifteen hundred dollars and costs of suit. Patrick Shea died March 30, 1888. Had jurisdiction of the circuit court attached before his death, and, if so, did his death oust the jurisdiction of that court to proceed to a valid judgment?

The petition stated a cause of action which authorized an attachment, and survived his death: *Higgins v. Breen*, 9 Mo. 497.

The filing of the petition, affidavit, and bond for attachment, the issuance of the writ, and the levy thereof during the lifetime of Patrick Shea gave the court jurisdiction of the attached land: *Hardin v. Lee*, 51 Mo. 241; *Freeman v. Thompson*, 53 Mo. 183; *Abernathy v. Moore*, 83 Mo. 71. It is well settled in this state, whatever may be the judicial opinion in other jurisdictions, that an action begun and prosecuted against a defendant who was dead when it was begun is absolutely void, and can be attacked collaterally as well as directly: *Bollinger v. Chouteau*, 20 Mo. 89; *Williams v. Hudson*, 93 Mo. 524; *Crosley v. Hutton*, 98 Mo. 196; *Graves v. Ewart*, 99 Mo. 13; *Jaicks v. Sullivan*, 128 Mo. 177.

But the great weight of authority in this country is that where a court has acquired jurisdiction of the subject matter and of the person, the death of the defendant before the judgment is rendered will not render the judgment void for that reason: *Yaple v. Titus*, 41 Pa. St. 195, 80 Am. Dec. 604; *Warder v. Tainter*, 4 Watts, 279; *Collins v. Mitchell*, 5 Fla. 364; *Freeman on Judgments*, 4th ed., sec. 140.

We proceed one step further. The action by attachment in *Louisa Shea v. Patrick Shea* only sought to subject his lands and property in Polk county to the satisfaction of any judgment she might receive. For all practical purposes it was a proceeding in rem.

Jurisdiction over the res had been fully acquired by the seizure under a regular writ in the lifetime of Patrick Shea. Does the fact that he subsequently died before the order of ~~007~~ publication was, or by law could have been, executed render the judgment obtained thereon in ignorance of his death void? Our answer is that in this court in all collateral attacks it is held that in attachment causes the jurisdiction over any given subject matter is obtained by the levy thereon of a writ properly issued, and no matter what nor how great errors or irregularities may subsequently occur the res remains still in the grasp of the court, and its judgment in regard thereto will be valid and binding until reversed on error or appeal, or set aside in a direct and appropriate proceeding for that purpose: *Hardin v. Lee*, 51 Mo. 241; *Freeman v. Thompson*, 53 Mo. 183.

The completion of the publication after Patrick Shea's death was irregular, and no doubt the court would have proceeded no further had that fact been brought to its attention, but it was not, or it would doubtless have set aside the judgment had application been made within the time permitted by statute, but it must be held that the judgment obtained in that suit was not void, and hence is not open to this collateral attack. The circuit court's instructions numbered 3 and 4 for plaintiffs were erroneous because the record itself disclosed the suit was brought and writ levied prior to the death of Patrick Shea. It likewise erred in refusing defendant's fourth instruction, which was in consonance with the views already expressed.

2. The circuit court gave defendant's first instruction, and the evidence seems to have established every fact upon which it is predicated, and yet the court rendered judgment against that finding. It is quite plain that the court erred in this respect also. Plaintiff cannot recover this land in ejectment, even though the judgment for Mrs. Shea was void. They have been guilty of the grossest laches and are equitably estopped: *Evans v. Snyder*, 64 Mo. 516; *Landrum v. Union Bank*, 63 Mo. 48; *Collins v. Rogers*, 63 Mo. 515.

For the foregoing errors the judgment of the circuit court ~~008~~ is reversed and the cause remanded for further proceedings in accordance with this opinion.

Sherwood and Burgess, JJ., concur.

ATTACHMENT—DEATH OF DEFENDANT.—If judgment is recovered against a defendant in attachment before his death, the attachment lien, upon his decease, may be enforced against the property charged therewith; but a suit of attachment commenced after the death of the defendant is void. If the defendant dies pending the action, the attachment is, in some jurisdictions, dissolved, and the attachment lien is destroyed; in other jurisdictions, the lien survives his death: See the monographic note to *Waltt v. Thompson*, 80 Am. Dec. 139-143; *Dow v. Blake*, 148 Ill. 76, 39 Am. St. Rep. 156.

JUDGMENT—DEATH OF PARTY.—Where a court has obtained jurisdiction of the parties and the subject matter during the lifetime of the parties to the suit, a judgment rendered for or against one of them after his death, though erroneous and liable to be set aside on direct proceedings, is not void nor subject to collateral attack; but if a suit is brought in favor of or against one already dead, a judgment rendered therein is void: See the monographic note to *Watt v. Brookover*, 29 Am. St. Rep. 816-819.

ESTOPPEL—EJECTMENT.—One who stands by without making known his claim and suffers another to purchase and expend money on his land, under an erroneous opinion of title, cannot assert his legal title against such person: Note to *Redmond v. Excelsior Sav. etc. Assn.*, 75 Am. St. Rep. 717. Equitable estoppels are proper defenses in ejectment, and are admissible under the plea of not guilty: *Hagan v. Ellis*, 39 Fla. 463, 63 Am. St. Rep. 167. Compare *Linnerts v. Dorway*, 173 Ill. 508, 67 Am. St. Rep. 232.

Am. St. Rep. Vol. LXXVII.—60

CASES
IN THE
SUPREME COURT
OF
NEVADA.

STATE v. CROSBY.

[24 Nevada, 115.]

CONSTITUTIONAL LAW — COURTS-MARTIAL — RIGHT OF ACCUSED TO COUNSEL.—Under a constitutional provision that "in any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil cases," a person prosecuted for an offense before a court-martial organized under the laws of the state is guaranteed the right to defend by counsel.

COURTS-MARTIAL—RIGHT OF ATTORNEY TO APPEAR BEFORE.—A statute forbidding, under penalty, any person to practice law in any court in the state, except justice's, recorder's, or a municipal court, without having received a license as attorney or counselor, limits the right of appearing as an attorney before courts-martial to those who have obtained the required license.

COURTS-MARTIAL—RIGHT TO SUSPEND ATTORNEY.—A court-martial, or any other court other than the supreme court, has no power to suspend a licensed attorney in the exercise of his rights for any cause, or for any length of time. If the attorney's conduct is contemptuous before a court-martial, that court can avail itself of the remedy provided by statute, but it cannot suspend him or interrupt him in the exercise of his rights.

COURTS-MARTIAL—MANDAMUS AS REMEDY TO ENFORCE RIGHT OF ATTORNEY TO APPEAR.—Mandamus is the proper remedy to enforce the right of a licensed attorney to appear for his client in a prosecution before a court-martial when such right is denied by that court.

F. M. Huffaker, in propria persona, for the petitioner.

J. R. Judge, attorney general, and **F. P. Langan**, for the respondents.

119 MASSEY, J. The petition recites that the relator is a regularly admitted and practicing attorney of this state;

that on the tenth day of July, 1897, one N. I. Morgan, second lieutenant of Battery A, Nevada National Guard, was charged with violating the articles of war; that on the thirteenth day of July, 1897, the ¹²⁰ defendants were detailed, by order, to constitute a general court-martial for the trial of such persons as might be brought before it; that on the twenty-fourth day of July, 1897, the said court-martial was organized, pursuant to said order, at Virginia City, Nevada, and selected Colonel J. J. Crosby as president thereof, and Colonel F. C. Lord as judge-advocate; that thereupon the said court-martial adjourned to the seventeenth day of August, 1897; that said Morgan was cited to appear before said court-martial for trial upon the charges preferred, and that on the last-named date he did appear before said court-martial, with the petitioner, whom he had retained and employed to conduct his defense, prepared and ready for trial. Objection was made to the petitioner appearing and conducting said defense, and the court-martial sustained the objection, and refused the petitioner that right and privilege. Upon these facts, the petitioner asks the court to direct the said court-martial to vacate its order refusing petitioner such right, and to allow him to appear and make the defense.

The defendants interpose a demurrer to the petition and set up by answer affirmative matter to justify said order.

Section 8, article 1, of our constitution declares that: "No person shall be tried for a capital or other infamous crime (except in cases of impeachment, and in cases of the militia when in active service, and the land and naval forces in time of war, or which this state may keep in time of peace, with the consent of Congress, and in cases of petit larceny, under the regulation of the legislature), except on presentment or indictment of a grand jury, and in any trial in any court whatever, the party accused shall be allowed to appear and defend in person, and with counsel, as in civil actions."

The court of appeals of New York, discussing the New York constitution, which was in every respect similar to the above provisions of our constitution, say: "The question presented in this case is, whether a person prosecuted for an offense before a court-martial, organized under the laws of this state, can demand as a constitutional right that he be allowed to defend with counsel, or whether this privilege is a matter of favor and discretion. . . . 'In any trial in any court whatever,' is certainly comprehensive enough to em-

brace these tribunals. . . . Whatever the accused ¹²¹ can say or do in his defense, he may say or do by counsel": *People v. Van Allen*, 55 N. Y. 33.

The action was a proceeding in certiorari by the accused, and is not cited for the purpose of determining the right of the relator, in the case at bar, to the writ prayed for. The court-martial having been organized under our statute, and Morgan, the accused, having been cited to appear before the same for trial upon the charges preferred, the provision of our constitution, and the authority above cited, gave him the right to make such defense by counsel. The accused having chosen and employed the relator to make such defense, the question then to be determined is to what extent can the court interfere with or abridge that right, and the rights of the relator under his employment. Other provisions of our law than the one cited must determine this question. Our legislature, by the provisions of the act relative to attorneys and counselors at law, approved October 31, 1861, has attempted to define the rights of the relator under his said employment, and to prescribe his duties and liabilities thereunder: *Gen. Stats.*, sec. 2529 et seq.

This statute forbids, under penalty, any person to practice law in any court in this state, except a justice's, recorder's, or municipal court, without having received a license as attorney or counselor, as required by other provisions of the act: *Gen. Stats.*, sec. 2537.

The exception in this section clearly limits the right of appearing as an attorney before courts-martial to those who have obtained the required license. The relator was qualified to act in this respect. The relator being qualified to act as counsel for the accused before the court-martial, under his employment, and not having been discharged, it is further provided by the same act that a change of counsel might be made in the action at any time before final judgment or determination, upon relator's own consent, filed with the clerk, or entered upon the order of the court or judge thereof, on application of the client: *Gen. Stats.*, sec. 2539.

There is no pretense that any change of counsel was asked by either the accused or the relator; but it is claimed by the defendants, in justification of their conduct in refusing relator ¹²² the right to appear and defend the accused, that the allowance of counsel, in such cases, is a matter of courtesy, and that the court-martial has the power to exclude a person ob-

jectionable to it from appearing as counsel for the accused; that the relator was objectionable to the court-martial, and in contempt thereof, in that the relator had applied to the district court of the state in behalf of the accused for a writ of injunction to prevent the said court-martial from trying the accused upon the specified charges; that in the application for the writ of injunction it was alleged that the citizens' committee for the celebration of the Fourth of July had issued invitations to the militia of Storey county to participate in said celebration; that it was also alleged in said application that the judge-advocate of said court-martial was detailed to sit in judgment upon his own charges, contrary to law; that the relator, in his argument upon said application, sought to prejudice the court-martial and its officers in the eyes of the community wherein it had been convened; that the relator has also sought to have the order creating said court-martial revoked.

The contention that the allowance of counsel is a matter of courtesy is fully met by the provision of our constitution above cited. There is no court within this state possessing the power to deny this right. Whether or not the alleged conduct of relator was in contempt of the court-martial is not material, yet we suggest that very often proceedings are instituted before one tribunal questioning, and even denying, the authority and power of another tribunal.

Admitting that the alleged conduct of relator was in contempt of the court-martial, had it the power to suspend or interrupt him in the exercise of his rights as a licensed attorney for such contempt? We cannot so hold.

Section 14 of the act relating to attorneys, above cited, provides that an attorney may be removed or suspended by the supreme court, and by no other court, for cause, and the sections following prescribe the manner of proceeding, and the judgment upon conviction: Gen. Stats., sec. 2542 et seq.

No power or authority, so far as we have been able to find, is given to any other than the supreme court to suspend an attorney in the exercise of his rights for any cause and for ~~123~~ any length of time. He must be charged as prescribed by the statute, and, upon those charges, has the right of trial. If the alleged conduct of the relator was contemptuous, our statute provides an ample penalty for it, and the court-martial is given power and authority to as fully punish for such

conduct as the judges of the district courts have under the laws of this state: Gen. Stats., secs. 670, 3482 et seq.

It is further contended that the relator has mistaken his remedy; that the court-martial being a court within the meaning of the constitution, and having made its order precluding the relator from defending the accused, its determination of that matter, although it may have been erroneous, is final, and cannot be reviewed in this proceeding. We cannot sustain this contention.

Our statute authorizes the issuance of the writ of mandate "by any court in this state, except a justice's, to any inferior tribunal, . . . to compel the admission of a party to the use and enjoyment of a right . . . to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal," in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law: Gen. Stats., secs. 3469, 3470; State v. McCullough, 3 Nev. 202; State v. Cronan, 23 Nev. 437.

If Morgan, the accused, were complaining of the denial of his constitutional right to be defended by counsel, then mandamus would not be the proper proceeding; but the relator is not a party to the proceedings against Morgan, pending before the court-martial. He has no right to appeal therefrom, and, so far as we can see, no other remedy in the ordinary course of law. He is denied a right unlawfully—by a tribunal that has no authority whatever to act in the matter, and is without remedy, except by mandamus.

Counsel for defendants cites State v. Wright, 4 Nev. 119, and State v. Board of Commrs. etc., 8 Nev. 309, as supporting the last contention, but we do not think the cases can be so construed. In both cases, it appears that the inferior tribunals had determined matters which they were expressly authorized to determine; that they had acted upon matters clearly within their power and jurisdiction, while, in the case at bar, the court-martial ¹²⁴ assumed to do what the law expressly says it shall not do, viz., suspend an attorney in the exercise of his rights as such.

For these reasons the writ of mandate will be issued as prayed for.

COURTS-MARTIAL and martial law are discussed in the monographic note to Wilson v. Mackenzie, 42 Am. Dec. 57, 58.

ATTORNEYS — SUSPENSION AND DISBARMENT OF. — All courts of record having authority to admit attorneys to practice

may strike their names from the roll: See the monographic note to *Burns v. Allen*, 2 Am. St. Rep. 847, on summary jurisdiction over attorneys. On the subject of disbarment and suspension of attorneys in general, see the monographic notes to *In re Philbrook*, 45 Am. St. Rep. 71-86; *State v. Kirke*, 95 Am. Dec. 833-845.

MANDAMUS TO INFERIOR COURTS is discussed in the monographic note to *Dane v. Derby*, 89 Am. Dec. 739, 740, on the law of mandamus.

BARNES v. WESTERN UNION TELEGRAPH COMPANY.

[24 Nevada, 125.]

NEGLIGENCE—CONFLICT OF EVIDENCE—APPELLATE PRACTICE.—If, upon the issue of negligence, the evidence is conflicting and justifies a finding either for or against it, the judgment of the lower court cannot be disturbed on appeal.

TELEGRAPH COMPANIES—LIABILITY FOR DELAY.—A telegraph company, upon the receipt of a message and the sum demanded therefor, undertakes, notwithstanding any stipulations in its blanks, to transmit the message with reasonable care and dispatch, and to deliver it to the person addressed without neglect or unnecessary delay. For a failure to so deliver it the company is liable in damages.

TELEGRAPH COMPANIES — LIABILITY FOR UNREPEATED MESSAGE.—A contract contained in a telegraphic blank stipulating that the company shall not be liable for mistakes or delays in the transmission or delivery, or for nondelivery of an un-repeated message, does not exonerate the company from liability for negligent delay in the delivery of an un-repeated message received and correctly transcribed at the terminal or delivery office.

NEGLIGENCE—PROXIMATE CAUSE.—Unreasonable delay in the delivery of a telegraphic message is not the proximate cause of an injury caused by being run over by rail-cars, due to the injured party's negligence.

R. B. Carpenter, for the appellant.

E. S. Farrington, for the respondent.

¹³⁵ **BONNIFIELD, J.** This action was brought to recover damages alleged to ¹³⁶ have been sustained by the plaintiff by reason of the defendant's delay in delivering a telegraph message to the party to whom it was addressed at Lovelock, Nevada.

It is alleged in the complaint that the said telegram was delivered to the defendant on the nineteenth day of February, 1895, at about the hour of 1 o'clock in the morning at Grand Junction in the state of Colorado, to be transmitted by the defendant over its telegraph line to Lovelock, state of Nevada,

and there to be delivered to T. J. Barnes; that the plaintiff paid to the defendant the sum of sixty cents, the same being the price demanded by the defendant, and the usual and customary charge of defendant for its services in transmitting and delivering such message; that in consideration of said sum of money the defendant did then and there promise and agree, and it became and was the duty of the defendant, to send and transmit said telegram through and over its said telegraph line from Grand Junction, in the state of Colorado, to Lovelock, in the state of Nevada, with reasonable diligence and attention, and without delay or neglect, and to deliver the same without delay or neglect and with reasonable dispatch to said T. J. Barnes at Lovelock, Nevada; that said telegram was duly and promptly sent by defendant to its office at Lovelock, and was received by defendant at its said office on the nineteenth day of February, 1895; that the said T. J. Barnes, on the said nineteenth day of February, and for more than twelve months prior thereto, resided in said town of Lovelock, which was well known in said town; that said Barnes was at his residence on the nineteenth day of February, and every day thereafter up to and including the twenty-third day of February; that said defendant negligently, willfully, and recklessly failed to deliver said telegram to the said T. J. Barnes, and said Barnes never received said telegram until the twenty-second day of February, 1895, at the hour of 2 o'clock in the afternoon of said day or thereabouts; that said telegram was as follows: "Grand Junction, Colo., 2-19. To T. J. Barnes, Lovelock, Nevada: Telegraph me ticket to Ogden. William Barnes"; that had said telegram been promptly delivered by said defendant at Lovelock, plaintiff would at once have received from T. J. Barnes a ticket sufficient for his immediate passage from Ogden, Utah, to Lovelock, Nevada; that by ¹³⁷ reason of defendant's negligence as aforesaid, plaintiff was compelled to walk out of the city of Ogden on the twenty-first day of February and did immediately thereafter walk and tramp from said city of Ogden to the town of Battle Mountain, Nevada, a distance of more than three hundred and twenty miles, all to plaintiff's great worry and distress of mind; that at said town of Battle Mountain, on or about the twenty-third day of February, 1895, the plaintiff was, without negligence on his part, run over by a car on the track of the Central Pacific Railroad Company and his right leg crushed, and thereafter said leg was amputated above

the knee, all by reason of defendant's negligence as aforesaid, and to the plaintiff's damage in the sum of two thousand dollars.

The defendant answered by denying the allegations of the complaint, and alleging that the dispatch in controversy was filed and received at 1:45 o'clock A. M. at Grand Junction, Colorado, on the twentieth day of February, and by mistake of its operator was dated the nineteenth day of February; that defendant delivered the message to T. J. Barnes on the twenty-first day of February; that said Barnes resided two or three miles from Lovelock, in the country; that the manager and messenger of the defendant were ignorant of his location or the proper place to deliver said message, and averring good faith and diligence in its effort to deliver said message on the day it was received; that the injury of the plaintiff at Battle Mountain was caused by his own criminal misconduct, carelessness, and negligence. The answer also sets up a certain contract and alleges its execution by both parties. The contract was printed on the back of the message delivered by the plaintiff to the defendant, and, so far as it is claimed to be material in this case, it is as follows: "To guard against mistakes or delays, the sender of a message should order it repeated, that is, telegraphed back to the original office for comparison. For this, one-half the regular rate is charged in addition. It is agreed between the sender of this message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery, or non-delivery of any unrepeatd message, whether happening by the neglect of its servants or otherwise, beyond the amount received for sending the same."

¹²⁸ On the face of the blank form is the following: "Send the following message subject to the terms on the back hereof, which are hereby agreed to." Immediately below this the telegram in question was written by the operator and signed by the plaintiff.

The jury returned a verdict for the plaintiff for the sum of twelve hundred and fifty dollars damages, and judgment was entered accordingly. This appeal is taken from the judgment and from the order of the court denying defendant's motion for new trial.

Negligence: Counsel for appellant contends that there was no unreasonable delay in delivering the message to T. J. Barnes at Lovelock; that there was no negligence on the part

of the appellant with respect thereto. Counsel for respondent contends that there was gross negligence in delaying the delivery of said message to T. J. Barnes after it was received by appellant at its Lovelock office. Counsel have reviewed the evidence fully and argued at great length in support of their respective contentions.

Without reviewing the evidence in this opinion upon the many facts disclosed bearing upon the issue of negligence, it is sufficient to say, that there is substantial conflict in the evidence with respect thereto, and evidence sufficient to support either contention, and that therefore this court would not be justified in interfering with the verdict of the jury or the finding of the court in favor of the plaintiff on this issue.

The contract or stipulation: Counsel for appellant points out the following portion of the contract set up in its answer, as being that part on which it relied in the court below and relies on this appeal, to wit: "It is agreed between the sender of this message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery, or for nondelivery of any unrepeatd message, whether happening by the neglect of its servants or otherwise, beyond the amount received for sending the same." The telegram in question was an unrepeatd message.

The contention of appellant's counsel with respect to the contract is that it is reasonable and valid; that the message was received, transmitted, and delivered subject to its conditions; that it superseded any legal duty of the defendant ¹³⁹ in regard to the transmission and delivery; that the contract was intended to modify the legal duties and liabilities of the defendant, and that the plaintiff knew he had contracted against the recovery of damages in case of delay or nondelivery if the message was not repeated.

Upon the other hand, counsel for respondent maintains that any stipulation restricting the liability of the company for negligence is against public policy and void; that the stipulation restricting liability for an unrepeatd message is unreasonable and void where the complaint is not for mistake or errors in the message but for delay or failure to deliver the message. The discussion with respect to the validity of the contract in question has taken a wide range. Counsel have exhibited great industry in collecting and reviewing the authorities in support of their respective contentions.

We will not follow them through their exhaustive arguments and extended review of many of the decided cases relating to questions which have arisen in other courts with respect to the validity of these stipulations on telegraphic messages, but which questions are not involved in this case. The defendant, when it received said message from the plaintiff and the sum demanded therefor, undertook thereby, and its legal obligation was, not only to transmit the same over its telegraphic line to Lovelock, Nevada, with reasonable care and dispatch, but to there deliver it to T. J. Barnes without neglect or unnecessary delay. For failure to so deliver the message the law imposed upon it certain liability for the damages which the plaintiff might sustain by reason of negligent or unnecessary delay in the delivery. The question then to be considered and determined on this branch of the case may properly be formulated as follows: Has the contract or stipulation named the legal effect of restricting said liability by reason of the telegram being an unrepeatd message, no mistake having been made in the tenor thereof?

It clearly appears to us that no such effect was intended or contemplated by either of the contracting parties when they entered into the contract. The evident and only objects in having telegraphic messages repeated are to enable the operators transmitting and receiving the same over the ¹⁴⁰ wires to readily detect and correct any mistakes or errors they might make in the message as received for transmission and delivery and thus enable the defendant to avoid such errors and their legal consequences. A delay or the nondelivery of a message, might be caused by mistake made by the operators in the name or the address of the person to whom the message is sent, which might be detected and corrected if the message was repeated, and thereby delay, or the nondelivery of the message, be avoided. If the delay complained of in this case was attributable to any such mistake, counsel's contentions and arguments in behalf of the appellant would be based on more reasonable grounds and be supported by many of the decided cases. It is not claimed, however, that the delay on which this action is based would or might have been avoided if the message had been repeated. The facts preclude such claim. When the repetition of the message could not have had any tendency to prevent the delay in this case, and when the delay was in no manner attributable to its not being repeated, the stipulation cannot,

in our opinion, be held, with any degree of reason, to have the effect of restricting the defendant's said liability. To consider that the minds of the parties met and agreed that the defendant's liability should be restricted for delay in delivering the message after it reached the Lovelock office, although it might be transmitted to and taken off there without any mistake occurring, it seems to us would be without reason, and would be ascribing to the parties an intent to relieve the defendant from the legitimate consequences of making default in the performance of a legal obligation, however great the damages might be to the plaintiff resulting therefrom, simply because he did not see fit to have the message repeated and pay an additional sum therefor, although the doing of which might prove to be utterly useless and nonsensical as a preventive of such default. So long as the parties are to be regarded as legally competent to enter into contracts, we cannot impute to them any such intent. If the telegraph company had such intent in placing such stipulations on its blank forms, then, evidently, its object was to deceive its patrons and to entrap them into unconsciously relieving it from liability for nonperformance ¹⁴¹ of a plain legal and moral obligation. We are not willing to ascribe to it such intent or object. The repetition of the message would have had no legitimate effect to induce or to expedite the delivery in this case.

"It is clear that if such a stipulation, assented to, is sustained as having the force of a contract or condition, the company is under no obligation to deliver any unrepeatd message. For this reason such stipulations, exacted and assented to, are generally treated as unreasonable and void": Sutherland on Damages, sec. 958.

Authorities: Many cases have been cited by appellant's counsel in which it is held that the stipulations as set forth in the printed form used by the telegraph companies are reasonable and valid, but the most of them are cases where mistake was made in omitting words, or in the substitution of words, or where the words of the message were obscure or in cipher, and where the error would likely have been detected if the message had been repeated. On the other hand, counsel for respondent has cited numerous authorities holding to the contrary, and a great many which hold that such stipulations do not have the legal effect of restricting the company's liability for delay in delivering an unrepeatd message after

it has been received, and correctly transcribed at the terminal office: *Western Union Tel. Co. v. Henderson*, 89 Ala. 510, 18 Am. St. Rep. 148; *Smith v. Western Union Tel. Co.*, 83 Ky. 104, 4 Am. St. Rep. 126; *Western Union Tel. Co. v. Broesche*, 72 Tex. 654, 13 Am. St. Rep. 843; *Western Union Tel. Co. v. Graham*, 1 Colo. 230, 9 Am. Rep. 136; *True v. International Tel. Co.*, 60 Me. 9, 11 Am. Rep. 156; *Hibbard v. Western Union Tel. Co.*, 33 Wis. 558, 14 Am. Rep. 775; *Western Union Tel. Co. v. Eubank*, 100 Ky. 591, 66 Am. St. Rep. 361; *Western Union Tel. Co. v. Cook*, 61 Fed. Rep. 624; *Fleischner v. Pacific Postal Tel. Co.*, 55 Fed. Rep. 738.

Many other decisions are in line with the above cases. All of these cases are based on better reasoning and sounder legal principles, in our opinion, than the few cases which sustain these stipulations as having the force of a contract or condition with respect to delay or nondelivery of an unrepeatd message where no mistake or error has been committed at the initial or terminal office.

Damages: That the damages awarded by the jury are excessive, that the evidence is insufficient to support the verdict, and that the verdict is against law and the evidence, are grounds on which the motion for new trial was based. It will be observed that it is alleged in the complaint that the negligence of the defendant in delaying the delivery of the dispatch resulted in the plaintiff being compelled to walk out of Ogden and tramp to Battle Mountain, a distance of more than three hundred and twenty miles, and that he did so, to his great worry and distress of mind, and in the plaintiff being run over at Battle Mountain, without negligence on his part, by a railroad car, his leg being crushed and afterward amputated above the knee, all to his damage in the sum of two thousand dollars. The evidence with respect to the accident at Battle Mountain shows that it was due to the plaintiff's own negligence and fault; besides, the damages resulting to the plaintiff therefrom were not the natural and proximate consequence of the defendant's breach of the contract to deliver said message without unnecessary delay. This evidence was withdrawn by the court from the consideration of the jury, and the court instructed the jury that no damages could be awarded for mental anguish. When this was done there was but little left of the plaintiff's case on the question of damages.

By partly walking and partly beating his way on the railroad cars, the plaintiff arrived at Battle Mountain, where the accident occurred. If it be conceded that "it was natural and probable that he would proceed on foot to Lovelock or steal a ride on the trains," and that "this was what any reasonable man could have anticipated under the circumstances known by the defendant when the telegram was received at Grand Junction," as claimed by respondent's counsel, we are of opinion that the damages award of twelve hundred and fifty dollars by the jury was, nevertheless, greatly in excess of the damages the plaintiff sustained at Ogden or Battle Mountain, or on the road between the two places, other than from the worry and distress of mind alleged to have resulted from his having to walk and tramp, and damages sustained from the crushing and amputation of the leg, all of which were eliminated from the case by the court. It seems clear that the jury must have, mainly, based their verdict on these matters¹⁴³ which were thus withdrawn from their consideration. In this the verdict was against the law as given by the court.

The judgment and order appealed from must be reversed. It is so ordered.

Counsel for appellant urges objections to instructions given, and to the refusal of the court to give instructions he asked for. We are of opinion that counsel has no just cause of complaint in this respect. The instructions were exceedingly favorable to the defendant and in the main substantially as the counsel requested.

Belknap, C. J., concurred.

Massey, J., being of counsel in the case, did not participate in the above decision.

APPEAL—CONFLICT OF EVIDENCE.—If there is any competent evidence to support a finding of fact, it is a general rule that the judgment will not be disturbed on appeal, though the evidence is conflicting: *Lathrop v. Tracy*, 24 Colo. 332, 65 Am. St. Rep. 229; *Frankfort v. Coleman*, 19 Ind. App. 368, 65 Am. St. Rep. 412.

TELEGRAPH COMPANIES—CONTRACT AGAINST NEGLIGENCE.—If a telegraph company causes injury by its neglect in transmitting a message, no contract between it and the sender will bar a recovery: *Western Union Tel. Co. v. Eubanks*, 100 Ky. 591, 66 Am. St. Rep. 361.

TELEGRAPH COMPANIES—UNREPEATED MESSAGE.—A printed stipulation upon the back of a blank, used for sending a telegraph message, that the telegraph company shall not be answerable for mistakes or delays unless the message is repeated, is invalid: *Western Union Tel. Co. v. Eubanks*, 100 Ky. 591, 66 Am. St.

Rep. 361. See, further, the monographic note to *Webbe v. Western Union Tel. Co.*, 61 Am. St. Rep. 216, 217; *Western Union Tel. Co. v. Beals*, 58 Neb. 415, 71 Am. St. Rep. 682.

TELEGRAPH COMPANIES.—DAMAGES not the proximate result of the failure of a telegraph company to transmit and deliver a message cannot be recovered: Monographic note to *Western Union Tel. Co. v. Cooper*, 10 Am. St. Rep. 779. But see *McPeak v. Western Union Tel. Co.*, 107 Iowa, 856, 70 Am. St. Rep. 205.

ADAMS v. BAKER.

[24 Nevada, 162.]

HOMESTEADS — PRIOR RECORDED MORTGAGE — EFFECT AS NOTICE—MISDESCRIPTION.—A wife who has filed a declaration of homestead on community property is not affected with notice of a prior recorded mortgage executed by her husband and misdescribing the property, nor by the fact that the parties to the mortgage intended to embrace therein the property covered by the declaration of homestead.

EQUITY—JURISDICTION TO CORRECT MISTAKE.—In all cases of mistake in written instruments courts of equity can interfere only as between the original parties, or those claiming under them in privity.

HOMESTEAD — REFORMATION OF MORTGAGE AS AGAINST SUBSEQUENT DECLARATION.—Equity cannot reform a mistake in a mortgage on community property executed by the husband, as against his wife, who has filed a declaration of homestead on such property, without notice of the defective mortgage.

A. Chartz, for the appellant.

T. Coffin, for the respondent.

¹⁰⁸ **BONNIFIELD, J.** This action was brought by F. B. Adams, as plaintiff, against Archie Baker and Lucy Baker, his wife, as defendants. The object of the action was to secure the reformation and foreclosure of an alleged mortgage executed by Archie Baker to said plaintiff.

The plaintiff alleges in his complaint, in substance and in brief, that on the ninth day of October, 1895, the defendant, Archie Baker, was indebted to the plaintiff in the sum of seven hundred and sixty-four dollars and seventy-five cents, and executed and delivered to plaintiff his certain promissory note for said sum on said day; that at the time of the execution of said note, said defendant, Archie Baker, the better to secure the payment of the same, executed to plaintiff his certain mortgage, a copy of which is attached to the complaint

and made part thereof as an exhibit; that the true description of the land and premises intended to be described and embraced in said mortgage is as follows: "All that portion of block 64 of Proctor and Green's division of Carson City, Ormsby county, state of Nevada, described as follows: Commencing at the southwest corner of said block 64, where the east line of Nevada street intersects the north line of Robinson street, as said streets are laid down on the official map of said city, running thence north along the east line of Nevada street eighty-eight feet, thence at right angles east parallel with the north line of Robinson street a distance of seventy-four feet; thence at right angles south eighty-eight feet to the north line of Robinson street; thence west along the north line of Robinson street to the place of beginning"; that by an oversight, inadvertence, or mistake said property was described in said mortgage as follows: "The property at the southwest corner of the block in Carson City, said county and state, of which ¹⁰⁷ Spear street is the western boundary, and Robinson street the southern boundary, commencing at the corner of the block at the intersection of Spear and Robinson streets; thence easterly along the north line of Robinson street one hundred feet; thence at right angles northerly at right angles with Robinson street seventy-four feet; thence westerly parallel with Robinson street one hundred feet to Spear street; thence southerly along the east line of Spear street seventy-four feet to the place of beginning"; that Nevada street and not Spear street forms the western boundary of said land and premises, and that Spear street is the first street south of Robinson street and running parallel therewith; that defendant, Lucy Baker, is the wife of the defendant, Archie Baker, and that said defendants have at all times therein mentioned resided upon said land and premises, and have occupied the same as a homestead; that said Lucy Baker claims some interest in said land and premises by reason of having filed a declaration of homestead thereon since the execution and recordation of said mortgage; that at the time of and before the filing of said declaration of homestead, she had notice and knowledge of the fact of said indebtedness of Archie Baker to the plaintiff, and of the execution of said note and mortgage to secure the same, and of the said oversight, inadvertence, or mistake in the description of the premises intended to be described therein, and that she had knowledge and notice that said mortgage was intended to embrace

and cover by a correct description of the property occupied by said defendants as a homestead.

Archie Baker made default, Lucy Baker answered for herself alone, and by her answer denies that Archie Baker at any time executed any mortgage or any lien of any character whatsoever upon the land described in her homestead declaration to the plaintiff, or at all; denies specifically each allegation of the complaint charging that she had knowledge and notice of said indebtedness, of the execution of said note and mortgage, or either of them, of the oversight, inadvertence, or mistake and of the intent that said mortgage was to embrace or cover said homestead premises.

It is alleged by the answer that said property is the community property of the defendants; and all the necessary facts to entitle her to said property as a homestead under the statute are properly set out in the answer and established by the proofs.

The court adjudged and decreed, to wit: "That plaintiff's mortgage be and the same is hereby reformed by inserting therein, in lieu of the description of the property now therein contained, the following, to wit." Here follows the description first above given as set out in the complaint, and which is substantially the same as the description contained in said homestead declaration. It is further decreed "that said reformation shall take and have effect from and after and as of the date of the recording of said mortgage, to wit, October 10, 1895." It was further decreed in form and substance usual in case of foreclosure of mortgages on real estate. From the decree, and the order of the court denying her motion for new trial, Lucy Baker appeals.

The said homestead declaration was duly filed on the seventh day of April, 1896, and before this suit was commenced. The case seems to have been tried in the court below, and was argued here by respective counsel, mainly upon the theory that the rights of the parties depended upon whether or not the appellant, before she filed her said declaration, had knowledge or notice, actual or constructive, of the execution of said mortgage, and of the alleged intent of the parties thereto that the mortgage should embrace and cover said homestead property.

The evidence, without any conflict, shows that the appellant had no knowledge, and had no notice whatever, of the execution of said mortgage before the commencement of this

action, unless the filing of said mortgage in the office of the county recorder gave her constructive notice of the same.

Counsel for respondent contends that said filing gave her such notice of its contents and was legally sufficient to put her on inquiry as to the facts.

The matter of constructive notice is entirely a creature of the statute: *Grellet v. Heilshorn*, 4 Nev. 526.

Under our statute concerning conveyances, every conveyance of real estate, and every instrument of writing setting forth an agreement to convey any real estate, or whereby ¹⁰⁰ any real estate may be affected, acknowledged, or proved and certified and recorded in the manner prescribed by said statute, shall from the time of filing the same with the county recorder for record impart notice of the contents thereof to subsequent purchasers and mortgagees only: *Sharon v. Minnock*, 6 Nev. 377; *McCabe v. Grey*, 20 Cal. 516.

The appellant is neither a purchaser nor mortgagee of said premises. Counsel argues that, the property being the community property of the defendants, the husband had a perfect right to mortgage the property without the knowledge or consent of the wife, citing *Child v. Singleton*, 15 Nev. 461.

It is true that the husband may, by a valid mortgage, and without the knowledge or consent of the wife, subject the homestead premises to a lien superior to the wife's homestead claim made and filed subsequently to the making of the mortgage. But the control of the husband over the community property and his power to alienate or mortgage the same without the co-operation and consent of the wife may be arrested and defeated by the wife filing her declaration claiming the same as a homestead at any time before the consummation of the alienation or mortgaging of the premises by the husband.

Under the statute concerning the exemption of the homestead from forced sale, the wife has a perfect right to select a homestead out of the community property and file the required declaration without the knowledge or consent of her husband: Gen. Stats., sec. 539. And, when so selected, it is exempt from the payment of any mortgage thereon subsequently given, unless the same is executed and given by both husband and wife. It will be observed that the record shows that Robinson and Spear streets are parallel to each other and extend through Carson City, east and west. The description in the mortgage will not apply to the said homestead

premises, or to any other piece or parcel of land, and the alleged mortgage mortgaged nothing. It is admitted that said homestead premises were not embraced in or covered by said mortgage when the appellant filed her declaration, but it is claimed that it was intended to mortgage the same, and that the rights of the appellant are precluded by the intent of the parties to the said mortgage. That is, that the ¹⁷⁰ appellant's homestead claim was defeated by the state of mind of the mortgagor and mortgagees on the ninth day of October, and not by the alleged mortgage itself. But it requires prior alienation or a mortgage in fact of the community property by the husband, and not simply in intent, to defeat the legal effect of the wife's declaration claiming the same as her homestead.

We are clearly of opinion that the appellant had the right to claim said premises as a homestead, and that she is protected therein against any mortgage or pretended mortgage which by its terms mortgages nothing. The rights or equities of the respondent as against Archie Baker are not matters to be considered here, as they are not involved in this appeal.

The premises in question became the homestead of appellant as provided by law, and as such are protected by the constitution. We are of opinion that her homestead rights in the premises are superior to any equity of the respondent, and that he has none as against appellant.

In all cases of mistake in written instruments, courts of equity will interfere only as between the original parties, or those claiming under them in privity, such as personal representatives, heirs, devisees, legatees, assignees, voluntary grantees, or judgment creditors, or purchasers from them, with notice of the facts: Story's Equity Jurisprudence, sec. 165. Appellant belongs to neither of the above classes of persons in this case.

It follows from the foregoing that the decree of the court reforming said mortgage and foreclosing the same as against the appellant and her said homestead claim is erroneous.

The said decree is reversed, and the trial court will modify the same so that it shall not interfere with or impair the appellant's homestead claim in the premises.

MORTGAGE, DEFECTIVE REGISTRATION OF.—A mortgage in which there is a mistake in the description of the premises in the record is not duly recorded: See the extended note to Green v. Garlington, 91 Am. Dec. 109, on defective registration of conveyances.

The record of a mortgage of lot 16 in block 67 is not notice of an intention to mortgage lot 16 in block 57, though the mortgages are the owners of that lot and not of the one described in the mortgage: *Baker v. Bartlett*, 18 Mont. 446, 56 Am. St. Rep. 594.

REFORMATION OF INSTRUMENTS. — The jurisdiction of equity to reform a contract to express the real agreement between the parties may be exercised as between the parties themselves, but not against innocent third persons who have acquired intervening rights and who cannot be placed in statu quo: See the monographic note to *Williams v. Hamilton*, 65 Am. St. Rep. 502, 508.

Reformation of Deed or Encumbrance as Against Homestead Claimants.

It is well settled that reformation may be had of a mortgage of a homestead or of a conveyance designed to pass the homestead, where either by mistake fails correctly to describe the lands intended to be subject thereto, provided the instrument is executed and acknowledged by both husband and wife in conformity to the statute governing such cases. This rule was firmly established in Alabama, and there first applied in *Gardner v. Moore*, 75 Ala. 394, 51 Am. Rep. 454, wherein it was held that a court of equity may assume jurisdiction to reform a mortgage of a homestead belonging to a married man, and executed and acknowledged by himself and his wife in conformity to the statute, by correcting the description of the conveyed premises, where they are described in the mortgage as containing a stated number of acres, and the desired reformation does not seek to increase the quantity of the lands conveyed, or to locate them in a different section, but merely to correct an admitted error in the designation of the subdivisions of the same section. This rule was again approved and applied in *Witherington v. Mason*, 86 Ala. 345, 11 Am. St. Rep. 41. Equity may also correct a misdescription in a deed made by mutual mistake, and executed by husband and wife, conveying land held by them as tenants in common, and constituting a part of their homestead, if it appears that the purchaser paid full value and the conveyance was sufficient to pass the wife's interest, though she was ignorant of the fact that she was part owner of the land conveyed: *Parker v. Parker*, 88 Ala. 362, 16 Am. St. Rep. 52. Reformation of a deed of a husband's exempt homestead may be had where the conveyance by mistake fails to correctly describe the homestead, provided the instrument is executed and acknowledged by husband and wife as required by the statute: *Tillis v. Smith*, 108 Ala. 264. In *Stevens v. Holman*, 112 Cal. 345, 53 Am. St. Rep. 216, it was determined that if a husband and wife agree to mortgage their homestead, and execute a mortgage which they know does not include the whole thereof, but which they know is accepted by the mortgagee in the belief that it includes all of such homestead, the mortgage may be reformed in equity so as to include all the land agreed upon to be mortgaged. In *Snell v. Snell*, 123 Ill. 403, 5 Am. St. Rep. 526, it appeared that a husband and wife executed a mortgage duly acknowledged, intended to cover their homestead, which by mistake was not properly described, and on a bill against the wife and the

husband's heirs, after his death, to reform the instrument, and for foreclosure, it was held that the court had jurisdiction to reform the mortgage against the wife, and that she was concluded by the decree the same as any other person. In this case the court corrected the mortgage of lands in section 20, and made it cover lands in section 27: *Snell v. Snell*, 123 Ill. 403, 5 Am. St. Rep. 528. In speaking on this subject, in *Denlson v. Gambill*, 81 Ill. App. 170-175, the court said: "The other question which has been elaborately argued is, whether the complainant, under proper bill and proofs, is entitled to have the mortgage corrected as to the description of the mortgaged property, and has the court power to correct it so as to make it speak the truth, as the parties intended. We have already said that the mortgage is executed in strict compliance with the homestead law; hence the evidence of the waiver of the right of homestead is not to be created anew, but it already exists in writing, and was made through the acts of the mortgagors themselves, and the only thing left to inquire about and ascertain by a court of equity is whether the homestead right that was waived ought to be made to apply to the property which really constituted the homestead, and, if so, whether a court of chancery has the power to make it apply. The latter question is the only one that now concerns us. We think this question was fully answered in the affirmative in *Snell v. Snell*, 123 Ill. 404, 5 Am. St. Rep. 528, and in *Casler v. Byers*, 129 Ill. 657." In *Beyschlag v. Van Wagoner*, 46 Mich. 91, it was held that if a mortgage of a homestead duly executed by husband and wife contains an erroneous call in the description of the premises which are fully capable of identification, the mortgage is not void, but may be corrected in equity like any other conveyance, and the mortgage lien cannot be postponed to an attachment or execution levy made upon the same title. If a mortgage on land expressly reserves to the mortgagor a homestead, this, without more, must be treated as a reservation of one thousand dollars' worth of land from the operation of the mortgage, without regard to whether the conditions exist which are necessary to entitle the debtor to the exemption of a homestead under the statute. But if such reservation is intended merely to express what is supposed by mistake to be the legal right of the debtor, when, in fact, he is not entitled under the statute, to the exemption of a homestead, the mortgage may, as against the husband at least, be so reformed as to include the homestead, but to entitle to this relief it must be alleged and proved that all the land that was subject to mortgage was intended to be mortgaged, and that but for the mistake it would have been included: *Lear v. Prather*, 89 Ky. 501. A mortgage cannot be reformed so as to include the homestead, though intended to be embraced therein, if the statute has not been complied with requiring the signature and acknowledgment of the wife to the instrument: *O'Malley v. Buddy*, 79 Wis. 147, 24 Am. St. Rep. 702.

No cases directly involving the point decided in the principal case are to be found. It has been decided, however, that a mortgage lien cannot be defeated by a declaration of homestead made after such mortgage lien has attached: *Law v. Spence* (Sup. Ct. Idaho), 48 Pac. Rep. 282. And that the homestead rights of the mortgagor are subject to the ordinary legal and equitable rights of the mortgagee in respect to the mortgaged premises, which may be enforced by the appropriate remedies: *Lowell v. Doe*, 44 Minn. 144.

It was admitted in the principal case that a husband had the right by a valid mortgage, executed without the knowledge or consent of his wife, to create a lien superior to the wife's homestead claim subsequently made and filed. The mere mistake in the description of the premises contained in the mortgage cannot, in view of the rules and cases discussed above, have the effect of rendering the mortgage totally void, and no reason is perceived why the rule maintaining the right to reform a deed to, or mortgage of, a homestead where the only defect is a mistake in description therein, is not equally applicable when the homestead declaration is filed subsequently to the execution of such mortgage, especially if it is recorded, or if the party filing the declaration has actual notice of the mortgage.

If, then, a husband, because of there being no declaration of homestead on file, is competent to execute a deed or mortgage of property, and undertakes to do so, but fails in part because of some mistake of description in the instrument, which fails to make it express his intention, there can be no doubt that, notwithstanding the imperfection in such instrument, an equitable right or title is created in his grantee or mortgagee, entitling him to come into equity as against such husband and compel the execution of a perfect instrument in the form originally intended between the parties, and it is a general rule that where an equitable right or title exists against a party, it may be enforced against him and all parties claiming under him or from him, unless they are in contemplation of law bona fide purchasers, acquiring their right or title and making full payment therefor without notice of the pre-existing equity. The filing of a declaration of homestead does not constitute the party filing it a bona fide purchaser for value without notice, or entitled to protection as such. He or she takes the title as it exists at the time of the filing of such declaration and subject to all claims then existing against it, unless the statute has in express terms declared otherwise. No such statute exists as affecting the principal case; the wife there is not a subsequent purchaser for value, but stands rather as a voluntary grantee claiming in privacy under her husband who executed the mortgage and subject to the same rights and remedies in favor of the mortgagee and against the husband, which necessarily include the right to protect his equitable lien under the mortgage and to have it reformed in equity so as to make it speak the true intention of the parties to it.

NESBITT v. DELAMAR'S NEVADA GOLD MINING CO.

[24 Nevada, 273.]

MINES AND MINING—LOCATION WORK, WHO AUTHORIZED TO DO.—Work done by a mere trespasser or stranger to the title of a mine does not inure to the benefit of the locator, but if the mine is represented by an owner, and annual work is performed by or at his instance, or of some one in privity with him, it is sufficient.

MINES AND MINING—EFFECT OF CONGRESSIONAL ACTS.—The recording of the notice prescribed by special act of Congress suspending the requirement of section 2324 of the national Revised Statutes relative to the annual labor on mining claims, has the same legal effect as the performance of such labor.

MINES AND MINING—ASSESSMENT WORK—FORFEITURE.—If a person, under the honest belief that he has secured the interest of two of three original locators of a mining claim, by purchase, under execution sale, and, being recognized as tenant in common by the other original locator, and at his instance, files notice, as required by special act of Congress, that they intend in good faith to hold and work such claim, he thereby prevents the claim from becoming forfeited or subject to relocation, so long as such notice is in effect.

MINES AND MINING—ASSESSMENT WORK—NOTICE, WHO MAY FILE.—In order to entitle a mine locator to file the notice authorized by special act of Congress that he, in good faith, intends to hold and work the claim, it is not necessary that he should have a valid title to such claim, especially when there are conflicting locations of the same claim.

MINES AND MINING—JUDGMENT QUIETING TITLE—RIGHT TO ATTACK.—A judgment quieting title to a mining claim in favor of one of the original locators and his cotenants, as against defendant, whose relocation is invalid, cannot be attacked by the latter on the ground that the alleged title of such cotenants is in other parties.

MINES AND MINING—COTENANCY QUIETING TITLE.—If a complaint alleges that plaintiff and his cotenants are in possession of a mine, and prays that the title be quieted in him and them, the action is for the benefit of all of the cotenants.

MINES AND MINING.—NOTICE OF ADVERSE CLAIM to a mine may be filed by one cotenant in behalf of all of them, without power of attorney from his cotenants.

EXECUTIONS—SALES—COLOR OF TITLE.—The purchaser's certificate of sale under execution shows color of title in him.

MINES AND MINING.—PUBLICATION AND POSTING OF NOTICE OF APPLICATION FOR PATENT to a mine is a process which brings all adverse claimants into court, and compels them to appear and file adverse claims.

MINES AND MINING—ADVERSE CLAIMS—WAIVER.—Failure to file an adverse claim to a mine within the time fixed by law, after application for a patent therefor, operates as a waiver of all rights which were the proper subject of such claim.

H. Rives and T. J. Osborne, for the appellant,

G. S. Sawyer, for the respondent.

²⁸⁰ BONNIFIELD, J. W. M. Davidson filed his application in the United States land office at Carson City for a patent to the Sleeper mine, situated in Ferguson mining district, Lincoln county, and the plaintiff filed in said office a protest against the issuance of such patent and an adverse claim to that portion of the Sleeper mine embraced within the boundaries of the Fraction mine, claiming said Fraction mine for himself and his alleged co-owners, George Nesbitt and A. Borth, as tenants in common.

This action was brought by the plaintiff against said W. M. Davidson, pursuant to section 2325 of the Revised Statutes of the United States and section 1900 of the General Statutes of Nevada, to determine the right of possession to the Fraction mine.

The case was tried before the district court in and for said county without a jury. A judgment was given in favor of said plaintiff and his cotenants. A notice of motion for new trial was given and statement on motion made by W. M. Davidson, the defendant. Before said motion was heard, Delamar's Nevada Gold Mining Company was substituted for said Davidson as defendant. The motion was denied. The appeal is taken from the judgment and from the order denying a new trial.

²⁸¹ The notice of motion for new trial designates as grounds thereof: 1. Insufficiency of the evidence to justify the judgment, and that the judgment is against law; 2. Errors in law occurring at the trial and excepted to by the defendant. The court made no express findings. One of the specifications of error is that the judgment is not supported by the evidence. The inquiry then is presented, Is there substantial evidence to support the judgment?

The evidence shows that W. De Beck, H. Stevens, and A. Borth located the Fraction mine on the twelfth day of May, 1892, and that they performed all the acts required to make a valid location; that the Nesbitt Brothers and A. Borth did assessment work in each of the years 1895, 1896, and 1897 to the full amount required by law; that the Sleeper mine was located on the first day of January, 1895, and the boundaries thereof take in the Fraction mine; that no work was done on the Fraction mine in either of the years 1893 and 1894,

but that the Nesbitt Brothers in December of each of said years had a notice recorded in the county recorder's office where the original notice of the location of the Fraction mine was filed, declaring their intention in good faith to hold and work said mine.

The plaintiff claimed that he and George Nesbitt, his brother, had acquired all the right, title, interest, and claim of said W. De Beck and H. Stevens in and to the Fraction mine, and that they and A. Borth were the owners of said mine as tenants in common. In support of this claim he offered in evidence a judgment recovered by the Nesbitt Brothers against said W. De Beck for two hundred and twelve dollars in the justice's court of Pioche township in Lincoln county, and a judgment recovered by them against said H. Stevens on the same day and in the same court for one hundred and sixty dollars, together with all the records, papers, and proceedings of said court in said cases, to the introduction of which counsel for defendant objected on several different grounds, and the court excluded them on the ground, in effect, that the record showed that the justice's court had not acquired jurisdiction over either defendant in either of said cases.

It appears that on the fifteenth day of July, 1893, the justice's court issued an execution on each of said judgments and ~~and~~ specially deputed A. J. Denton, pursuant to the provisions of section 571 of the civil practice act, to serve the same; that on the eleventh day of August next following, said special officer sold to the Nesbitt Brothers all the right, title, and interest of said De Beck and Stevens, respectively, in and to the Fraction mine under and in pursuance of the commands of said executions; that on said last date said officer executed to the Nesbitt Brothers a certificate of said sales, respectively, and filed a duplicate copy thereof in the office of the county recorder on the nineteenth day of August, 1893; that on the nineteenth day of February, 1894, said officer executed to the Nesbitt Brothers deeds of conveyance of the said interest of De Beck and Stevens, respectively, in said mine, no redemption having been made. The certificates and deeds were admitted in evidence against the objections of the defendant, but for the purpose only of showing, or as "tending to show, color of title and adverse possession."

Counsel for appellant contends, and his theory is, in effect, that said judgments being void, the certificates of sale and

the deeds executed to the Nesbitt Brothers are void and do not tend to show color of title or adverse possession to said Fraction mine; that all acts done by the Nesbitt Brothers with reference to said mine are nugatory and can avail the plaintiff nothing in this action; that they acquired no right to file said notice in 1893, nor in 1894, because the certificates of sale gave no right of entry upon the Fraction mine, and that said deeds gave no right to such entry; that the original locators of the Fraction mine having failed to perform the required annual labor for the years 1893 and 1894, and having failed to file any notice of intention to hold and work the mine as required by the acts of Congress in that respect, and the Nesbitt Brothers not having taken actual possession until the fall of 1895, the mine had been forfeited and was subject to relocation when the defendant and James Murphy located the Sleeper mine.

The vital question in this case is whether the said notices the Nesbitt Brothers caused to be recorded, of their intention to hold and work said mine, had the legal effect of saving the mine from being subject to relocation for any period of time. In determining this question it is not necessary to consider ²⁸⁸ what legal value said certificates of sale and deeds may have, if any, except as evidence tending to show the good faith of the Nesbitt Brothers and their coclaimant, A. Borth, in all they did with reference to said mine.

The evidence discloses that, from the date of said sales, A. Borth regarded the Nesbitt Brothers as having acquired all the interests of De Beck and Stevens in said mine, and that the Nesbitt Brothers and A. Borth mutually recognized each other as co-owners of said mining claim as tenants in common; that upon consultation and agreement between them, and at the request of A. Borth, the Nesbitt Brothers had said notices recorded in lieu of performing the annual labor; that said notices were recorded for the benefit of all three and to represent said mine; that in all things done in the premises all of said claimants acted in good faith and in the belief that the Nesbitt Brothers acquired all the right, title, and interest of De Beck and Stevens in and to said mine by virtue of said judgments, and sales made thereunder.

If the Nesbitt Brothers at the instance of A. Borth, and in pursuance of an agreement between them and him, had in good faith performed one hundred dollars' worth of labor or improvements on said mine in 1893 and 1894, pursuant to

the provisions of section 2324 of the United States Revised Statutes, certainly the mine would not have been subject to relocation on the first day of January, 1895, although it might turn out on judicial investigation that the Nesbitt Brothers had no legal or equitable title to any interest therein. Such labor would have represented the mine, and defeated any relocation made in 1895. It is true that work done by a mere trespasser or stranger to the title will not inure to the benefit of the locator: *Little Gunnel etc. Co. v. Kamber*, 1 Morr. Min. Rep. 536. But when the mine is represented by an owner, and annual work performed by or at the instance of the owner or some one in privity with him, it is sufficient: 2 Lindley on Mines, sec. 633.

Evidently, it was the intention of Congress, in passing the special acts of 1893 and 1894, suspending the requirements of section 2324 of the Revised Statutes as to the annual labor on mining claims, that the recording of the prescribed notice should have the same legal effect as performing the labor.

²⁸⁴ The act of 1893 provides "that no mining claim which has been regularly located and recorded as required by the local laws and mining regulations shall be subject to forfeiture for nonperformance of the annual assessment work for the year 1893; provided, that the claimant or claimants of any mining location, in order to secure the benefits of this act, shall cause to be recorded in the office where the location notice or certificate was filed on or before December 31, 1893, a notice that he or they in good faith intend to hold and work said claim." The act of 1894 was the same in terms as the act of 1893, except the year of 1894 was substituted for the year 1893.

The Fraction mine being represented by one of the locators, A. Borth, and said Nesbitt Brothers having had said notices recorded, in pursuance of said agreement and at the instance of said Borth, as well as of themselves, and under the honest belief of all three that the Nesbitt Brothers had legally acquired all the right, title, and interest of the other two locators by virtue of said judgments and sales made thereunder, we are of opinion that said mine had not been forfeited nor subject to relocation when the location of the Sleeper mine was made, and, therefore, that the location of the Sleeper mine was and is invalid in so far as it covers the Fraction mining claim.

The contention of counsel that, in the sense of said statutes of 1893 and 1894, "the claimant or claimants" authorized to secure the benefits of said acts must have a valid claim to the mining ground claimed, is not, in our opinion, tenable. In case of conflicting locations of the same mining claim, the respective claimants are both required to perform the annual labor, and in 1893 and 1894, they were both required to do the required assessment work, or cause the prescribed notice to be recorded in lieu thereof, yet in no such case could both have a valid claim to the same mine.

Counsel contends that the judgment is against law in that it quiets the title in the plaintiff, which title they allege "never existed, and which title, if it exists at all, is still in De Beck and Stevens, and with which title the plaintiff has shown neither a legal nor an equitable connection, and neither ²⁸⁵ of them (De Beck and Stevens) being parties to this action, that title cannot be affected by this action, nor can it be quieted in a party who is a stranger to it, and especially it cannot be quieted in favor of such stranger as against a bona fide prior occupant, claiming under color of title superior to that set up by the plaintiff."

The answer to this contention is that the title to the Fraction mine was quieted in the plaintiff and his said coclaimants, one of whom is A. Borth, one of the original locators; that, as we think we have shown, said mine has not been subject to forfeiture, and hence the defendant's relocation is invalid; that if the Nesbitt Brothers have no valid title to De Beck and Stevens' interest, and have not otherwise a valid interest in said mine, A. Borth has the exclusive right of possession as against them, as well as against the defendants, and the invalidity of the claim of the Nesbitt Brothers could not avail the defendant or make valid or strengthen his claim, nor could it invalidate or impair the validity of the claim of A. Borth. Any question that may exist, if any, between any of the locators of the Fraction mine and the Nesbitt Brothers as to the rights of the latter claimants with reference to said mine, is a matter solely of their own concern, and not a matter in which the defendant has any legal interest.

We are of opinion that the evidence is sufficient to support said judgment and that said judgment is not against law. The judgment and order appealed from are, therefore, affirmed.

ON PETITION FOR REHEARING.

BONNIFIELD, J. The first ground urged for a rehearing is "that the plaintiff does not pretend to sue except in his own behalf, and it certainly affirmatively appears from the complaint and the admissions in the case that he alone filed a protest in the United States land office against defendant's application for a patent, and therefore the appellant claims that this court erred in assuming, as it does in the opinion, that the plaintiff claimed in his protest or in this action said Fraction mine for himself and his alleged co-owners, George Nesbitt and A. Borth as tenants in common."

²⁸⁰ Counsel are in error in the above contention. By the complaint it is alleged that the plaintiff and his co-owners as tenants in common are in possession and entitled to the possession of the Fraction mine, etc. Also, that the plaintiff filed in the United States land office his and his cotenants' adverse claim to that portion of the Sleeper mine embraced within the Fraction mine, and plaintiff prays that the title to said Fraction mine be quieted in him and his cotenants, and such is the decree of the trial court. The adverse claim, filed as aforesaid, alleges, substantially, that the affiant (the plaintiff here) and his cotenants (naming them), George Nesbitt and A. Borth, are the owners, etc., of the Fraction mine as tenants in common.

By the answer it is alleged "that said plaintiff and the said George Nesbitt and A. Borth base their rights to such possession [of a portion of the Sleeper mine] upon the alleged pretended location called by them the Fraction mine."

Where a claim is owned by more than one individual, it is customary to select one to act in behalf of all, for which purpose a special power of attorney is executed and filed with the application, but this is not necessary: *Lindley on Mines*, sec. 681. The practice of the department has been to recognize such application, signed by one joint owner in behalf of himself and the remaining owners: *Lindley on Mines*, sec. 681; *Ayers v. Dailey*, 3 Copp's L. O. 196. Unquestionably, an act manifestly done by one co-owner for the benefit of all would be presumed to be authorized or at least ratified: *Lindley on Mines*, sec. 681.

The contention of petitioner that neither the certificates of sale of the interests of De Beck and Stevens in the Fraction mine nor the deeds of the officer show color of title in Nesbitt

Brothers we think is not correct. The certificates are regular in form and fully comply with section 3253 of the General Statutes of Nevada, which provides that: "Upon a sale of real estate [under execution] the purchaser shall be substituted to and acquire all the right, title, interest, and claim of the judgment debtor thereto, and, when the estate is less than a freehold of two years unexpired term, the sale shall be absolute. In all other cases the real property shall be subject to redemption ^{and} as provided in this chapter. The officer shall give to the purchaser a certificate of sale containing. . . . A duplicate of such certificate shall be filed by the officer in the office of the recorder of the county." All of which the officer did.

The deeds are also regular in form and purport to convey by the officers said interests of De Beck and Stevens in said mine to Nesbitt Brothers.

Petitioner further claims that, if the judgment is affirmed, the patent will be issued to the plaintiff, and that De Beck and Stevens will be robbed of possibly immensely valuable property. But it does not appear that De Beck and Stevens would be robbed of anything, or, if they were, how the appellant would be affected thereby. It does not appear that they have or claim to have any interest in said mine. It appears that they left the state about five years ago, and there is no intimation that they ever intend to return. It appears that after the location of said mine they did nothing to preserve their interests therein, and that nothing was done for them in that respect. Besides, this action is a continuation of the proceedings instituted in the United States land office, and it does not appear that De Beck and Stevens, or either of them, filed any protest or adverse claim in that office, or that any was filed in their behalf: *Wolverton v. Nichols*, 119 U. S. 485; *Doe v. Waterloo Min. Co.*, 43 Fed. Rep. 219.

"The statute makes such a proceeding regularly prosecuted when the period of notice is completed, without the presentation of an adverse claim absolutely conclusive against adverse claims. The proceeding is in the nature of a proceeding in rem, and is binding upon all the world so far as any unrepresented adverse claim is concerned": *Hamilton v. Southern Nevada Gold etc. Co.*, 13 Saw. 113.

"The publication and posting of notice of the application for patent is a process which brings all adverse claimants into court—a summons to all persons whose interests may be affected by the issuance of a patent to the tract applied for to

appear and file their adverse claim": Lindley on Mines, sec. 713, and cases cited.

"It is so well established as to be axiomatic that a failure ~~ess~~ to file an adverse claim within the time fixed by law operates as a waiver of all rights which were the proper subject of such a claim": Lindley on Mines, sec. 742, note 1.

We find no valid reason for granting a rehearing. It therefore is denied.

MINES—ADVERSE CLAIMANTS.—If a plaintiff's claim of title to a mining lode is void in its inception, he has no standing to question the validity of the defendant's title. Mining titles cannot be questioned collaterally: *Omar v. Soper*, 11 Colo. 380, 7 Am. St. Rep. 246.

MINES—FORFEITURE OF CLAIM.—A mining claim may be relocated if either forfeited or abandoned; but in order that a forfeiture may be worked, the facts upon which it is based must exist, and the statute must be pursued strictly: *Note to Elder v. Horse-shoe Min. etc. Co.*, 62 Am. St. Rep. 903. See, too, *Sisson v. Sommers*, 24 Nev. 379, post, p. 815.

SISSON v. SOMMERS.

[24 Nevada, 379.]

MINES AND MINING—LOCATIONS—COMPLIANCE WITH MINING LAWS.—To enable a person to maintain a right to a mining claim after it has been acquired, it is necessary that he shall continue substantially to comply, not only with the laws of Congress, but with the valid laws of the state and valid rules established by miners, in force in the district in which the claim is situated. A failure to comply with such laws and rules works a forfeiture of the claim, and it becomes subject to relocation by any qualified locator.

MINES AND MINING—LOCATION WORK—MINING LAWS.—A state statute requiring a mine locator, in order to perfect his location, to sink a discovery shaft, or make a cut of a certain depth, within ninety days after posting notice of the location, is not in conflict with the national mining law giving the locator one year in which to do one hundred dollars' worth of work, as a condition of holding the claim.

MINES AND MINING—LOCATION WORK—STATE LAWS.—The state cannot, by its legislation, dispense with the performance of the conditions imposed upon mine locators by national law, nor relieve the locator from the obligation of performing in good faith those acts which are declared by it to be essential to the maintenance and perpetuation of the estate acquired by location; but the state may require a reasonable additional amount of work to be done annually, and a reasonable amount of work to complete the location, or, after location, a reasonable additional amount of work within a reasonable time, less than the time named by the national law for the annual expenditure of one hundred dollars'

worth of work, as a condition of the right acquired by location of the mine.

MINES AND MINING—STATE LAWS.—The national mining act implies that the states and territories may require a reasonable amount of work to be done by mine locators within a reasonable time after location, independently of the annual assessment work prescribed by Congress.

Wren & Julien and Goodwin & Dodge, for the appellants.

R. M. Clarke, for the respondents.

335 **BONNIFIELD, C. J.** This action was brought to recover damages of the defendants for the alleged wrongful entering upon the Morning Star mining claim, and extracting and removing therefrom large quantities of valuable mineral-bearing rock, and to obtain a perpetual injunction restraining defendants from continuing the trespass. By the complaint the claim is particularly described by metes and bounds, and as being situated in Olinghouse Canyon, White Horse mining district, Washoe county, state of Nevada, and it is alleged, among other things, that the plaintiffs were, are now, and ever since the twenty-fourth day of May, 1897, have been, the owners, in the possession, and entitled to the possession, of said mining claim.

The answer puts in issue all the material allegations of the complaint, and alleges all the facts necessary to constitute a valid mining location by the defendants, December 22, 1897, of the mining ground described in the complaint, and named by defendants the "Forlorn Hope vein." And it is alleged that the defendants are the owners, in the possession, and entitled to the possession, of said mining claim. The sufficiency of the evidence on the part of the defendants is not **336** questioned by the plaintiffs, except that it is claimed that the ground was not subject to location by them.

The case was tried by the court sitting without a jury. The trial resulted in a judgment for the defendants. The plaintiffs appeal from the judgment, and from the order of the court denying their motion for new trial.

The plaintiffs' claim to said mining ground is based upon a location thereof claimed to have been made the twenty-second day of May, 1897, by one of the plaintiffs, and they introduced evidence to prove the performance of every act necessary to constitute a valid location, and every condition requisite to continue the right acquired thereby, under the laws of Congress and of this state. The sufficiency of such evidence in every material particular was contested at the trial, and is as-

sailed by counsel of defendants on appeal, by elaborate argument, while counsel for plaintiffs maintain the sufficiency of the evidence to prove every material fact by like argument.

As we understand it, the court found for the plaintiffs on all the facts except as to the doing of the discovery work prescribed by the Statutes of 1897, page 103, which provides:

"Sec. 2. Before the expiration of ninety days from the posting of such notice upon the claim, the locator must sink a discovery shaft upon the claim located to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper if necessary, to show by such work a lode deposit of mineral in place. A cut, or crosscut, or tunnel which cuts the lode at a depth of ten feet, or an open cut of at least ten feet in length along the lode from the point where the lode may be in any manner discovered, is equivalent to a discovery shaft."

The court found, in effect, that the discovery work done by plaintiffs within the ninety days was not sufficient under said statute, and that no further work was done by the plaintiffs prior to the entry of the defendants upon said mining claim on the twenty-second day of December, 1897.

As conclusion of law, the court found that the plaintiffs' location of the Morning Star mining claim was not completed prior to the entry of the defendants, on account of the lack of the amount of discovery work required by said ³⁸⁷ statute, and gave judgment for defendants accordingly. Counsel argue and urge that the work performed by the plaintiffs was a substantial compliance with said statute. By stipulation of the parties, the judge of the trial court visited the mining claim to determine from actual inspection and observation the sufficiency of the discovery work done by the plaintiffs, and to determine all other disputed matters of fact so far as the same might be determined by such examination. We do not consider that we are warranted by the evidence to disturb the finding of such facts by the court.

The validity of the provisions of said statute with reference to discovery work is directly involved in this case, and presented for determination on this appeal. The determination of this question will dispose of the case, and we do not deem it material to consider or pass upon the many other questions discussed by counsel.

In Colorado and several other states, the work as specified in the Nevada statute is required to be performed as a pre-

requisite to the completion of a location. The same character of work is required in other states, but it is not made, in terms at least, necessary to complete a location, but rather, as we think, a condition to the continuance of the right acquired by location.

We regard it as entirely immaterial whether, under state legislation in reference to discovery work, the performance thereof be regarded as a necessary act of location, or as a condition to the continuance of the right after location. If such legislation is valid in the one case, it is in the other.

In *Erhardt v. Boaro*, 113 U. S. 527, the supreme court of the United States recognized the validity of the Colorado act regarding such discovery work. We regard that case as sufficient authority on the subject. Many cases maintaining the validity of such state legislation are cited by Barringer and Adams in their work on the Law of Mines and Mining.

To enable a party to maintain a right to a mining claim after the right is acquired, it is necessary that the party continue substantially to comply, not only with the laws of Congress, but with the valid laws of the state and valid rules ³³⁸ established by the miners, in force in the district where the claim is situated upon which such right depends.

Failure to comply with such laws and rules works a forfeiture, whether the laws and rules provide for forfeiture for noncompliance or not, and the mining claim becomes subject to location by any qualified locator: *Mallett v. Uncle Sam Gold etc. Co.*, 1 Nev. 188, 90 Am. Dec. 484; *Oreamuno v. Uncle Sam Gold etc. Co.*, 1 Nev. 215; *Barringer and Adams on Mines and Mining*, 300.

Counsel for appellants admit that the state legislature may regulate the mode of acquiring and maintaining possession of mining claims, provided that the legislation is not in conflict with the laws of the United States, but contend that, as the act of Congress gives the locator of a mine one year at least after he has made his location to do the required amount of work in order to hold it, an act of the legislature limiting the time is in conflict with the act of Congress. They say, "although, under this provision of the act of Congress, the legislature would be authorized, no doubt, to require locators to do more than one hundred dollars' worth of work annually, but not to limit the time within which it should be done."

The contention that, although the legislature may properly require a greater amount of work than Congress has prescribed,

it cannot limit the time in which to do it, does not strike us with any great force of reason. Congress has made the one hundred dollars' worth of labor the minimum amount to be done, and the time named is the maximum time for the performance of the work without the risk of forfeiture. We think the legislature may require a reasonable additional amount of work to be done annually, and a reasonable amount of work to complete the location: *Erhardt v. Boaro*, 113 U. S. 527; or, after location, a reasonable additional amount of work within a reasonable time, less than the time named by Congress for the annual expenditure, as a condition to the continuance of the right acquired by location of the mine.

"The state may not, by its legislation, dispense with the performance of the conditions imposed by national law, nor relieve the locator from obligations of performing in good faith those acts which are declared by it to be essential to the maintenance and perpetuation of the estate acquired by location. Within these limits the state may legislate": ^{see} *Lindley on Mines*, 249. "No state has the right to decrease the amount of labor which congressional law requires to be done annually on a mining claim. The law clearly implies that the states and territories, or the district organizations in the absence of state or territorial legislation, may increase the amount of such labor": *Lindley on Mines*, 250.

The congressional law, we think, as clearly implies that the states and territories may require a reasonable amount of work to be done within a reasonable time after location independently of the annual assessment work prescribed by Congress.

We are aware that the policy of the Nevada statute is questioned by many miners and prospectors, but the courts are not to question such policy. The question of policy is solely for the legislative department to determine.

The judgment and order appealed from are affirmed.

MINES—FORFEITURE OF CLAIM.—A mining claim may be re-located if either forfeited or abandoned; but in order that a forfeiture may be worked, the facts upon which it is based must exist, and the statute must be pursued strictly: *Note to Elder v. Horseshoe Min. etc. Co.*, 62 Am. St. Rep. 903. See, too, *Nesbitt v. Delamar's etc. Min. Co.*, 24 Nev. 273, ante, p. 807.

AHLERS v. THOMAS.

[24 Nevada, 407.]

JUDGMENTS—PRIVITY.—A judgment is binding between the parties and all persons who are represented by them and claim under them, or who are privy to them.

JUDGMENTS.—BY PRIVITY is meant mutual or successive relationship to the rights of property, and it is classified into privy in estate, privy in blood, and privy in law, in all of which there must be an identity of interest.

JUDGMENTS — PRIVITY — INJUNCTION—GRANTEE OF PARTY.—A grantee of a person who has been enjoined from diverting the waters of a stream adjoining his land is in privy with him and bound by the injunction, although not a party to the suit in which it was granted.

CERTIORARI—JURISDICTION.—The question of jurisdiction of the court is the limit of inquiry upon certiorari.

TRIAL—COSTS IN SPECIAL PROCEEDINGS.—In contempt proceedings to enforce a judgment, costs may be awarded to the prevailing party.

H. Mayenbaum, for the petitioner.

P. M. Bowler, Jr., for the respondent.

⁴⁰⁷ **BELKNAP, J.** The record of the district court of the third judicial district in the above-entitled case has been certified to this court in obedience to a writ of certiorari issued upon the petition of P. Walsh, claiming that that court exceeded its jurisdiction in adjudging him guilty of contempt of its decree.

The record contains an affidavit of D. T. Wallace, upon ⁴⁰⁸ which the proceedings for contempt were instituted. It shows that affiant is one of the plaintiffs in that suit; that it was a controversy concerning the right to the use of the waters of a certain stream called "Cottonwood Canyon creek" for the purpose of irrigation; that a decree was entered and recorded June 3, 1882, enjoining defendants and their grantees and successors from diverting any of the waters of the stream; that two of the defendants, to wit, B. Toole and J. P. Thomas, have conveyed their interest in the land and water to P. Walsh, who is the petitioner above named, and whatever rights Walsh has in the premises are predicated upon his succession as grantee of the above-named persons, and not otherwise; that Walsh, conspiring with others, has wrongfully diverted the waters of

the stream, to the injury of plaintiffs, and in contempt of the decree.

Upon the hearing, oral and documentary evidence was introduced, and the district court filed written findings of fact supporting its conclusions, and entered an order adjudging petitioner guilty of contempt of its decree, and fined him one hundred dollars. Costs taxed at one hundred and fifteen dollars and ten cents were directed to be paid by the petitioner to the plaintiff and F. M. McMahon, one of the plaintiffs' grantees.

Counsel for petitioner urge that the district court did not have jurisdiction of the petitioner: 1. Because he was not a party to the suit; 2. That the decree enjoins grantees, etc.; but, as it appears from the record that the decree was rendered by default, and that the prayer to the complaint omitted to ask for relief against grantees, the relief given in this respect should be disregarded and held void. The general rule is that judgments are binding only upon parties, but there are exceptions as in the case of privies.

"When a judgment has been rendered between the parties, they are bound by it; and, to give full effect to the principle by which the parties are held bound by it, all persons who are represented by the parties, and claim under them, or are privy to them, are equally concluded by the same proceedings. By 'privy' is meant the mutual or successive relationship to the rights of property; and privies are classified according to the manner of this relationship. They are privies in estate, as donor and donee, lessor and lessee, and ⁴⁰⁰ joint tenants; privies in blood, as heir and ancestor, and coparceners; privies in representation, as testator and executor, administrator and intestate; privies in law, as where the law, without privy of blood or estate, casts land upon another, as by escheat. But all these kinds of privy are reduced to three, namely, privy in estate, privy in blood, and privy in law. The reason why persons standing in this relation to the litigating party are bound by the proceedings to which he is a party is that they are identified with him in interest; and, whenever this identity exists, all are alike concluded. Privies are therefore estopped from litigating that which is conclusive upon him with whom they are in privy": 3 Bouvier's Institutes, 373, 374.

In a footnote to Beach on Injunctions, page 174, it is said: "It is a well-settled general rule that the court has no right to grant an injunction against a person who is not a party to

the suit. The exceptions to this rule consist either of cases where the party enjoined is the mere solicitor or agent or tenant of a party to the suit, having no rights involved in the controversy, or where the right has been already determined": *Schalk v. Schmidt* (1862), 14 N. J. Eq. 268. See, also, *Freeman on Judgments*, 4th ed., 162; *Coles v. Allen*, 64 Ala. 98; *Adams County v. Graves*, 75 Iowa, 643; *Stoutimore v. Clark*, 70 Mo. 478; *Hair v. Wood*, 58 Tex. 79; *Lipscomb v. Postell*, 38 Miss. 476, 77 Am. Dec. 652; *Hunt v. Haven*, 52 N. H. 169; *Casamajor v. Stude*, 1 Sim. & St. 381.

It is claimed that Walsh is not a privy because, it is said, he does not claim rights to the use of the water through any conveyance by defendants, but through a subsequent right by appropriation.

The affidavit of Mr. Wallace shows that Walsh acquired his interest from Toole and Thomas, defendants, and not otherwise. This evidence, and other of like nature, shows that Walsh was in privity with the parties to the judgment.

Without considering in this proceeding the correctness of the conclusion reached by the district court upon this point in connection with testimony introduced by petitioner, it is certain that it is sufficient to establish the jurisdiction of the court, and that is the limit of the inquiry upon certiorari: *Philips v. Welch*, 12 Nev. 170.

⁴¹⁰ It is also claimed that the court exceeded its jurisdiction in taxing the costs against the contemner. The provisions of the civil practice act concerning costs (Gen. Stats., 3496 et seq.) apply to proceedings of contempt to enforce the execution of a judgment.

In *Rapalje on Contempt* it is said, at page 132: "When the proceeding arises out of the disobedience of an order or decree in a civil suit, and is prosecuted between the parties to the suit, costs are generally awarded to the prevailing party, the same as in other civil proceedings": See authorities cited in 4 *Ency. of Pl. & Pr.* 806.

It is ordered that the writ be dismissed.

A JUDGMENT IS CONCLUSIVE as against parties and privies on all questions adjudicated by it: *Barrick v. Horner*, 73 Md. 263, 44 Am. St. Rep. 283; *Harrison v. Walton*, 95 Va. 721, 64 Am. St. Rep. 830.

PRIVIES ARE THOSE who claim under or in right of parties, or who stand in mutual or successive relationship to the same

rights of property: See the monographic note to *Hill v. Bain*, 2 Am. St. Rep. 878. This relationship may result either by operation of law, by descent, or by transfer. Privies are divided into privies in law, privies in blood, and privies in estate: See the monographic note to *Howard v. Kennedy*, 39 Am. Dec. 311.

CERTIORARI—WHAT REVIEWABLE ON.—Upon certiorari to an inferior court only those errors or defects going to the jurisdiction of such court will be inquired into: Note to *Fulton v. State*, 74 Am. St. Rep. 858. On the scope of certiorari in general see the extended notes to *Wulzen v. Board of Supervisors*, 40 Am. St. Rep. 29-46; *Duggen v. McGruder*, 12 Am. Dec. 529-537.

CASES
IN THE
SUPREME COURT
OF
TEXAS.

SIMONTON v. WHITE.

[93 Texas, 50.]

DEEDS.—WHILE UNDER THE RULE IN SHELLEY'S CASE a conveyance to a grantee and his "bodily heirs," if not qualified, vests in such grantee an estate in fee simple, not because the grantor so intended, but because the law gives to the language that effect, yet the rule does not preclude a construction of the words "bodily heirs" so as to ascertain the grantor's intention.

DEEDS—RULE IN SHELLEY'S CASE—WHEN NOT APPLICABLE.—In a deed by a father to a daughter and her "bodily heirs," in consideration of his love for her and her four named children, the land conveyed not to be sold, but its produce to go to the support of the daughter and her family during her life, and "at her death to be equally and impartially divided between her bodily heirs," the words "bodily heirs" mean children, the rule in Shelley's Case does not apply, and the daughter takes an estate for life only, with remainder in fee to her children after her death.

DEEDS—RESTRAINT ON ALIENATION.—An estate for life may be vested in a married woman with a provision in restraint of alienation; hence where a deed conveying a life estate to a married woman expressly prohibits alienation, and creates in her a trust for the support of herself and children which is inconsistent with the power to convey, the children can recover the land from a grantee of such married woman and restore it to her.

Monta J. Moore and L. C. McBride, for the plaintiff in error.

Field & Taylor and Henderson, Streetman & Freeman, for the defendant in error.

⁵⁴ **BROWN, A. J.** The land in controversy was the community property of W. J. Gentry and his wife, who died previous to the transactions hereafter named; her husband and their three daughters, Ava Anna (now Mrs. Simonton), L. Zerza, and

Luddie Gentry survived. W. J. Gentry made and delivered to Mrs. Ava Anna Simonton the following deed:

"The State of Texas, }
"County of Milam. }

"Know all men by these presents, that I, W. J. Gentry, of the county of Milam and state aforesaid, for and in consideration of the love and affection and duty as a father towards my daughter, Ava Anna Simonton, her children, Willis, David, Curry, and Prince, have granted as a gift and conveyed by these presents do grant, give and convey unto the said Ava Anna Simonton and her bodily heirs of the county of Milam and state of Texas, all that certain tract or parcel of land lying and being situated in the county of Milam, and being a part of the Reuben Fisher league. [The field notes are omitted.] Now the above-described land and premises, together with other valuable stock and property heretofore given, granted, released unto my daughter, the said Ava Anna Simonton, constitute fully her ⁵⁵ pro rata share of my estate, real and personal. Now the above-mentioned land and property hereby conveyed is not to be traded or sold, but the produce of the same are to go to the support of the said Ava Anna Simonton and her family during her natural life, and at her death to be equally and impartially divided between her bodily heirs.

"To have and to hold the above-described premises, together with all and singular the rights and appurtenances thereunto in anywise belonging unto the said Ava Anna Simonton, her bodily heirs forever. And I do hereby bind my heirs, executors, and administrators to warrant and forever defend all and singular the said premises unto the said Ava Anna Simonton her bodily heirs against every person whomsoever lawfully claiming or to claim the same or any part thereof.

"Witness my hand, Baileyville, Texas, 2d day of September, A. D. 1892.

"W. J. GENTRY."

Ava Anna Simonton was, at the time the deed was made, the wife of J. M. Simonton, who is still living, and the mother of Willis, David, Curry, and Prince Simonton, all of whom are still living and minors. Since the making of the deed, other children have been born to Mr. and Mrs. Simonton. J. M. Simonton and the four children named lived with Mrs. Ava Anna Simonton at the time, and they all continue to live together.

Ava Anna Simonton and her husband, for a valuable consideration, executed at different times two deeds to J. H. Drennan, by which she conveyed to him seventy-five acres of the land described in the above deed, which was duly recorded. At a subsequent date, Ava Anna Simonton and her husband, by general warranty deed, conveyed one hundred and twenty-five acres of the land in controversy to White, and the deed was properly authenticated and duly recorded in Milam county. J. H. Drennan, for a valuable consideration paid, by warranty deed conveyed the seventy-five acres of land to White. White purchased the land and paid a valuable consideration without notice, except that given by the terms of the deed from Gentry to Mrs. Simonton, and has had exclusive possession of it since January 1, 1895, renting it out, collecting the rent, and appropriating it to his own use and benefit. The reasonable rental value of the land was nine hundred dollars per annum during the time that he has had possession of it. W. J. Gentry settled with the other daughters for their interest in the land in controversy at the time he conveyed it to Mrs. Simonton.

J. M. Simonton, as next friend of the minors, Willis, David, Curry, and Prince Simonton, sued in the district court of Milam county to recover the land from A. White. The case was tried before the district judge without a jury, who gave judgment for the defendant, which judgment was affirmed by the court of civil appeals.

The trial court held: 1. That under the deed from Gentry to Mrs. Simonton a fee simple title vested in the latter and passed to White; 2. If not, then a life estate vested in Mrs. Simonton which passed to White, and, she being alive, plaintiffs could not recover. If either proposition be correct, the judgment must be affirmed.

Under the rule in *Shelley's Case*, the words "give and convey unto the said Ava Anna Simonton and her bodily heirs," if not qualified, would vest in Mrs. Simonton an estate in fee simple, not because the grantor intended to convey to her such estate, but because the law gives to the language that effect: *Taylor v. Cleary*, 29 Gratt. 451. However, that rule does not preclude a construction of the words "bodily heirs" so as to ascertain the grantor's intention, but the well-established doctrine is, if it appears from the instrument that Gentry used the words "bodily heirs" to designate children of Mrs. Simonton, effect will be given to that intention and the estate conferred upon her will be limited to her life with remainder in fee to the children thus

pointed out: *Doe v. Laming*, 2 Burr. 1100; *Taylor v. Cleary*, 29 Gratt. 448; *May v. Ritchie*, 65 Ala. 602.

The consideration expressed in the deed from Gentry to Mrs. Simonton is the affection of the grantor for his daughter and her four children, naming them, and the duty which he owed to them. If Gentry used the words "bodily heirs" in their technical sense, the children would be excluded from the benefits of this conveyance, although they are embraced in the consideration expressed. The purpose to be accomplished by the conveyance is declared in the following language: "Now the above-mentioned land and property hereby conveyed is not to be traded or sold, but the produce of the same are to go to the support of the said Ava Anna Simonton and her family during her natural life, and, at her death, to be equally and impartially divided between her bodily heirs." If "bodily heirs" means the heirs of Mrs. Simonton in an indefinite line of succession, the provision quoted is void; the declared consideration is without meaning, and the clause forbidding alienation becomes inoperative. Governed by the rule in *Shelley's Case*, the requirement that the produce of the property should be applied to the support of the daughter and her children amounts to a false pretense, and the direction that, after Mrs. Simonton's death, the property should be equally divided between her bodily heirs, is impossible of execution and absurd. If, however, the words "bodily heirs," as used in the deed, be construed to mean the four children named, or to include with them those subsequently born, the consideration expressed and the declared purposes harmonize, the prohibitory clause is not only valid, but necessary for the preservation of the trust created, and the provision for common support responds to the declared paternal affection and duty. Under this construction, impartial distribution of the property at the termination of the life estate is both possible and just. The rule in *Shelley's Case*, if applied to this instrument, destroys all of the benefits which were intended to be conferred upon the children, and renders the instrument incongruous and contradictory in all of its parts, while the enforcement of the well-defined intention of the grantor harmonizes every provision ⁶⁷ of the deed. We conclude that Mrs. Simonton took an estate for life only, with remainder in fee to her children after her death.

It is claimed, however, if Mrs. Simonton did not take the estate in fee simple, she had a life estate in the land which passed by her deeds and mesne conveyances to White. It is

established in this state that an estate for life may be vested in a married woman with a provision in restraint of alienation: *Wallace v. Campbell*, 53 Tex. 229; *Monday v. Vance*, 92 Tex. 428. In the case last cited, Chief Justice Gaines examined this question with care, and, after stating the contrary rule which prevails in England, said: "A different rule prevails in some of the courts of this country, and notably in our own state (citing *Wallace v. Campbell*, 53 Tex. 229), but all the authorities recognize an exception in favor of married women; and it is universally held that a conveyance may be made in trust for their benefit with the restriction upon their power of alienation." In that case, there were no words of prohibition, but the trust was of such a character as rendered the estate inalienable. In this case, the deed expressly prohibits alienation and creates in Mrs. Simonton a trust for the support of herself and children which is inconsistent with the power to sell the property. "The very purpose of the deed in question was to provide a permanent support for the wife and children and the means of educating the latter. To permit an alienation of the interest of the beneficiaries is destructive of the trust and incompatible with its purposes": *Monday v. Vance*, 92 Tex. 428.

The conveyances made by Mrs. Simonton were in direct violation of the terms of the deed under which she held the estate in trust, and all purchasers claiming under her had notice of the want of power on her part to pass any title to the property.

The children born of Mrs. Simonton since the making of the deed are not parties to this suit, and there is no question raised as between them and those named in the instrument. The plaintiffs are beneficiaries in the deed; they are tenants in common with the other children, if the latter have a right in the land, and therefore are entitled to recover and restore the property to the trustee for its execution.

It may be necessary to adjust equities between the plaintiffs and the defendant, and we will not undertake to dispose of the case in this court, but the judgments of the district court and court of civil appeals will be reversed and this cause remanded for further trial.

DEEDS.—THE RULE IN SHELLEY'S CASE is one of property and public policy, and not of intention or construction: *Polk v. Farris*, 9 Yerg. 209, 30 Am. Dec. 400. But see *McIlhinny v. McIlhinny*, 137 Ind. 411, 45 Am. St. Rep. 186; *Wescott v. Binford*, 104 Iowa, 645, 65 Am. St. Rep. 530. For numerous applications of the rule, consult the monographic notes to *Carpenter v. Van Olinde*, 11 Am. St. Rep. 100-107; *Polk v. Farris*, 30 Am. Dec. 415-417.

**GALVESTON, HARRISBURG AND SAN ANTONIO RAIL-
WAY COMPANY v. ZANTZINGER.**

[98 Texas, 64.]

MASTER AND SERVANT—AUTHORITY TO PROTECT PROPERTY.—When one places his property in the possession of another, the right to protect that possession, as well as the right to prevent any interference with its immediate use, springs out of the possession and out of the duty to control and manage it.

MASTER AND SERVANT—EJECTING TRESPASSER—EVIDENCE.—Where an engineer of a switch engine has complete and absolute control of the machinery of the engine, there is sufficient evidence to require the court to submit to the jury the question of the authority, express or implied, of the engineer to eject a trespasser from the footboard of the locomotive, though such trespasser did not interfere with the actual manipulation of the machinery.

A. L. Jackson, for the plaintiff in error.

J. V. Meek, O. T. Holt, and J. H. Davenport, for the defendants in error.

⁶⁵ BROWN, A. J. "The plaintiff, Mrs. E. S. Zantzinger, who is joined in this action by her husband, is the mother of Almer Campbell, a minor, and this suit was in her own behalf, as well as in behalf of her son, to recover damages for personal injuries sustained by him, as it is claimed, through the negligence of the appellant, who was defendant below.

"The evidence adduced at the trial showed that defendant had a train of cars attached to the front end of a switch-engine which was running backward pulling the cars after it into the city of Houston from a neighboring station. The switch-engine had no pilot or 'cow-catcher' ⁶⁶ in front of it, but attached at each end was a footboard extending across the track. The car nearest the engine was a flat-car, several feet intervening between it and the footboard. While the train was slowly moving, Almer Campbell, without permission of anyone, and contrary to the rules of the company, went upon the footboard for the purpose of riding into Houston, and stood upon it between the engine and flat-car. After he had ridden a short distance, the cylinder cock of the engine was opened by the engineer, and hot water and steam were thereby thrown upon his legs and feet, whereupon he sprang from the footboard toward the flat-car, intending to get upon the latter, but missed it and fell upon the track, and was run over and injured so that he lost, practically, the use of one of his legs. The evidence is suffi-

cient to show that the cylinder cock was opened by the engineer for the purpose of throwing the steam and water upon the boy, in order to make him get off the engine, but the evidence does not warrant the conclusion that the engineer intended more than this, or that he intended to injure Campbell in the way in which he was injured. The engineer had authority to eject persons wrongfully riding upon the engine. The evidence is also sufficient to show that the fright and pain caused to Campbell by the steam and water also caused him to lose his presence of mind, and to make the leap in order to escape. He testified that he was facing the engineer with his back to the flat-car, and that, after the escape of the steam and water commenced, he turned and made the leap, calculating to reach the flat-car with his feet, but not with his hands; that after he fell between the cars, he crawled forty or fifty feet in the direction in which the train was moving in order to avoid the brake beam under the flat-car, and then attempted to get across the rail and was caught. There is also evidence tending to show that the engineer saw Campbell fall between the cars, knew his danger, and could have stopped the train in time to have avoided the injury. The uncontradicted evidence shows that in getting upon the footboard Campbell was a trespasser, and was guilty of negligence, and the court below so instructed the jury. He was nearly seventeen years of age, and understood the dangers and risks of the situation."

The plaintiff in error presents a number of objections to the judgment in this case which we think it unnecessary to discuss, except that the evidence was not sufficient to support the trial court in submitting to the jury the question of authority in the engineer to eject Almer Campbell from the footboard of the engine. If the evidence is sufficient to sustain the verdict, the objection must be overruled, although the preponderance may be in favor of a contrary conclusion.

It was proved that a switch-engine engaged in moving cars on the defendant's track near the city of Houston was being operated by J. D. Middleton, the engineer, who, according to the testimony of the foreman of the crew, had "the absolute possession of the machinery of the engine," the foreman having the right to direct the engineer when to move or stop and where to go. The engineer occupied the cab of the engine, ^{or} and could not occupy the footboard while engaged in moving the locomotive. It is evident that the engineer had complete and absolute control of the movements of the engine, and, although

he in fact sat in the cab while operating it, the greater part of the machinery over which he exercised control was outside of the cab.

When one places his property in the possession and under the control of another, the right to protect that possession, as well as the right to prevent any interference with its immediate use, springs out of the possession and out of the duty to control and manage it: *Carter v. Louisville etc. Ry. Co.*, 98 Ind. 552, 49 Am. Rep. 780; *Hoffman v. New York etc. R. R. Co.*, 87 N. Y. 25, 41 Am. Rep. 337.

The case of *Carter v. Louisville etc. Ry. Co.*, 98 Ind. 552, 49 Am. Rep. 780, is very much like this. In that case, a switch-engine was being operated in the yards of the railroad company, when one who had no right climbed upon the front of the locomotive under the headlight, and the engineer, who was in charge of the machinery, forcibly expelled him while the engine was in motion. The trespasser was injured and brought suit for damages. The railroad company claimed that the engineer acted without authority, but the court held that, being in charge of the locomotive, the engineer had authority to eject intruders, and in support of the conclusion the court said: "We think the appellee, by placing its servants in possession of a switch-engine for the purpose of placing and replacing cars upon the track at Lafayette, impliedly gave them authority not only to retain the exclusive possession of the engine while so engaged, but to remove from it all trespassers and wrongdoers. . . . Because the employer might, if present, remove from its engine a trespasser or from its station-house an intruder, so may the servant to whom the possession, care, and use of the station-house or switching engine have been intrusted, remove from the one or the other trespassers and wrongdoers. It is the right of possession in the master and the duty of the servant to whom the property has been intrusted to keep and maintain that possession for the master which give the latter the right to remove trespassers." We do not think that it was necessary that Almer Campbell's presence should interfere with the actual manipulation of the machinery by the engineer to authorize the latter to eject him from the footboard, but, being in the possession and control of the locomotive, it was the right and duty of the servant to protect that possession and to use his control for the benefit of his employer. If the authority of an engineer were restricted to the cab, the greater part of the machinery operated by him would be beyond his protection, and

retained in said conveyance to secure the payment of said notes. In 1862, the last note being due, said Park recovered a personal judgment thereon in the circuit court of the state of Alabama against Horace Summerhill for the amount then due on said note. Various executions were issued on said judgment and returned unsatisfied. In 1866 another execution was issued and levied on certain land in Lauderdale county, Alabama, as the property of said Horace Summerhill. Said Summerhill sued out a writ of injunction seeking to enjoin said judgment. The bill for injunction was filed on August 29, 1866, and upon order of the chancellor the writ of injunction was, after the complainant had entered into bond, issued by the register in chancery, restraining and enjoining said sheriff from further proceeding to execute the writ of fieri facias then in his hands, or any process from the circuit court of said county founded on said judgment, and the execution was on said date returned, 'Stayed by injunction.' The injunction bond ⁹⁹ given by said Horace Summerhill was signed by John Peters and George R. Summerhill, as sureties.

"1. The conditions of said injunction bond conformed to the requirements of the Alabama code, which is as follows, to wit:

"'Sec. 3869. No injunction must be issued to stay proceedings after judgment, in a personal action, until the party at whose application the writ issued gives bond and security in double the amount of such judgment, payable to and approved by the register, conditioned on the dissolution of such injunction, to pay the amount of the judgment enjoined with interest, and also such damages and costs as may be decreed against such party.'

"'Sec. 3876. A bond to enjoin proceedings at law on a judgment for money, upon the dissolution thereof, in whole or in part, either upon an interlocutory or final decree, has the force and effect of a judgment; and being certified by the register to the clerk of the court in which the judgment was rendered, execution may issue against any or all the obligors thereto, for the amount of such judgment which has been enjoined, interest, and the damages decreed.'

"Subsequent to the institution of said injunction proceeding in 1866 James Park died. Said proceeding was continued against his executors. Said injunction remained in full force and effect until April 3, 1880, and final judgment was rendered dissolving the injunction and dismissing the writ. The register in chancery thereupon, on October 27, 1880, in accordance

with the laws of Alabama, certified this final decree to the clerk of the circuit court with direction to issue execution against the complainant and G. R. Summerhill and John Peters, sureties on the injunction bond.

"On March 27, 1867, John Peters executed a conveyance to his niece, Elizabeth T. Swoope, wife of Jacob K. Swoope, conveying to her all of his property, in which the following provisions appear: 'For and in consideration of the natural love and affection he has and bears to his niece, the said Elizabeth T. Swoope, the wife of Jacob K. Swoope, as aforesaid, has given, granted, bargained, sold, and by these presents do give, grant, bargain, and sell to the said E. T. Swoope, all and singular, the goods, chattels, rights, credits, choses in action, and possession and any and all personal or mixed property now owned by or belonging to the said John Peters, and also all of the real estate situated and being in the county of Lauderdale, and state of Alabama, now belonging to the said John Peters, consisting in part of the plantation known and bounded as follows: [Then follows description of divers plantations and tracts of land] together with any and all other lands of any or whatever description now belonging to said John Peters, situated and lying in the county of Lauderdale aforesaid, . . . to have and to hold all of said estate, real, personal, and mixed, unto her, the said Elizabeth T. Swoope, as her separate estate; . . . but it is another and further consideration moving the said John Peters to execute this deed of indenture and it is hereby declared a charge upon the separate estate of the said Elizabeth T. Swoope, conveyed to her by ¹⁰⁰ this deed, that the said Jacob K. Swoope and Elizabeth T. Swoope do assume and pay out of said separate estate of the said Elizabeth T. Swoope conveyed to her as aforesaid, all of the just and lawful debts, and outstanding liabilities now owing by the said John Peters, to any and all persons whomsoever, and that they, said Jacob K. Swoope and Elizabeth T. Swoope, his wife, do provide for the comfortable support and maintenance of the said John Peters during his natural life, by paying to the said John Peters out of the separate estate of the said Elizabeth T. Swoope here conveyed, the sum of \$2,000 on the first day of January, 1868, and the same sum of \$2,000 on the first day of each year thereafter so long as the said John Peters shall live and no longer, it being the intent of this instrument that the payment of the said annual sum shall cease with the natural life of the said John Peters, and that the said Jacob K. Swoope and Elizabeth T.

Swoope are in no way to be accountable to the heirs or personal representatives of the said John Peters after his death for the payment of any portion of the said sum of \$2,000 per annum that shall remain unpaid at the time of his decease.' John Peters died in 1869. The record before us does not disclose that his death was suggested in the action in which the injunction bond was given, nor that any action was taken to revive his liability upon the injunction bond against his legal representatives. The facts stated in the original certificate show all the steps taken to enforce liability on the injunction bond so far as they are made to appear by the record.

"In 1881, James P. Hanner, as executor of James Park, filed a bill in equity in the chancery court of Lauderdale county, Alabama, against Elizabeth T. Swoope, whose husband was then dead, seeking to charge the land acquired by Mrs. Swoope from John Peters with liability for the judgment of Park against Summerhill by reason and force of the injunction bond executed by John Peters as surety aforesaid. This cause was continued from term to term, and in 1890 Mrs. Swoope died leaving a will, by which, after certain special devises and bequests, she bequeathed the rest and residue of her estate to her only daughter and heir, appellant, Tempe Darrow, who was referred to by name in the will as 'Tempe Swoope Darrow'; also as 'My only daughter and heir.' Said will recited: 'I hereby appoint my brother, Mark R. Haley, and my son in law, George M. Darrow, to be executors of my last will and testament.' After her death the suit against her was revived against her executors, and was finally settled on July 30, 1894, by appellant, Tempe Darrow, paying the sum of \$6,000, Mrs. Swoope having on May 1, 1881, in her lifetime, paid \$1,000 on said claim. Mrs. Darrow also paid the cost of suit, amounting to \$110.19. The value of the land received by Mrs. Swoope from John Peters was of the value of \$75,000. The property received by Tempe Darrow as residuary devisee of her mother, Mrs. Swoope, was of the value of \$35,000 and was a portion of that conveyed by John Peters to Mrs. Swoope, and the amount paid by Mrs. Darrow in settlement of the suit of Hanner, Executor, v. Elizabeth T. Swoope, was out of property which she had received as residuary devisee of her ¹⁰¹ mother's will. At that time, the estate of Mrs. Swoope had been wound up and settled and the residue delivered to Mrs. Darrow according to the will. This suit was about to be further prosecuted against Mrs. Darrow when the settlement was made, and she paid the \$6,000 as a full

and complete compromise and settlement of the judgment of the circuit court in favor of Park against Summerhill and all claims thereunder in all respects and against all persons whomsoever. She has never been reimbursed for the amount so paid, nor any part thereof. The suit in which this controversy arises was originally instituted by Fannie Caudle against George R. Summerhill, F. M. Henry, and Rebecca E. Amis, April, 1896, who are alleged to be in possession of the land here in controversy; the object of the suit being to foreclose a lien on the land for a balance alleged to be due on the judgment recovered by James Park against Horace Summerhill in the circuit court of Lauderdale county, Alabama, heretofore mentioned. It is further alleged that said lien existed by reason of the sale of said land to Horace Summerhill by James Park, a part of the consideration for which was a note which was the foundation of said judgment. Tempe Darrow, joined by her husband, George M. Darrow, intervened in said suit January 25, 1898, claiming that she had paid off said judgment, and asked that she be subrogated to said lien and that said land be subjected thereto, etc., and her right to subrogation is the question involved in this controversy.

"On May 8, 1876, Horace Summerhill deeded 700 acres of this land to his son, George R. Summerhill, reciting a cash consideration of \$5,000, but the true consideration was some \$5,000 which George R. Summerhill had previously paid on debts which his father owed. On February 8, 1877, Horace Summerhill deeded another 700 acres of this land to his daughter, Rebecca E. Amis, reciting a cash consideration of \$5,000, and, further than the recital in the deed, the evidence failed to disclose what the consideration was. Prior to this, in 1873, Horace Summerhill deeded to his son, William H. Summerhill, the other portion of the land, being 700 acres, reciting in said deed a cash consideration of \$5,000, but the true consideration was some \$8,000 or \$10,000 which said William H. Summerhill had previously paid on debts which his father owed. F. M. Henry obtained an interest in the land, and the land is now held by said George R. Summerhill, Rebecca E. Amis, and F. M. Henry, they having acquired the interest of William H. Summerhill. They acquired same with the full knowledge of the reservation of the lien in the deed from James Park to Horace Summerhill, to secure the purchase money for the same. From the time Tempe Darrow made said settlement and payments till the

bringing of this suit about three years and eight months had elapsed.

"2. Horace Summerhill lived in Lauderdale county, Alabama, at the time judgment was rendered in favor of said Parks against him by the circuit court in and for said county and state, and he lived there until his death, which occurred December 26, 1886. At his death he owned no property, and there has been no administration on his estate.

"The statutes of limitation of Alabama pertinent to the issues involved ¹⁰² herein are as follows: 'Sec. 3247. When the commencement of an action is stayed by injunction or statutory prohibition, the time of the continuance of the injunction or statute prohibition is not computed as part of the time. . . . Sec. 3250. When the United States is at war with a foreign country, and either party to a contract is a subject or citizen thereof, the time of the continuance of the war is not computed as a part of the time limited for the commencement of the suit.' 'Sec. 2908. No action abates by the death or other disability of the plaintiff or defendant if the cause of action survive or continue; but the same must, on motion, within eighteen months thereafter, be revived in the name of or against the legal representatives of the deceased, his successor, or party in interest; or the death of such party may be suggested upon the record, and the action proceed in the name of or against the survivor. . . . Sec. 3248. A disability which did not exist when the cause of action accrued does not suspend the operation of limitation unless the contrary is expressly provided.'

"It was provided by the code of Alabama that 'actions upon a judgment or decree of any court of Alabama, of the United States, or of any state or territory of the United States may be commenced in twenty years after the cause of action has accrued and not afterward; that actions founded upon any contract of writing under seal may be brought within ten years, and actions founded upon a promise in writing not under seal or actions arising from simple contracts may be brought within six years after the cause of action accrues.'

"Under the state of facts above related, these questions arise and are here propounded:

"1. Did John Peters, by becoming a surety upon the injunction bond of Horace Summerhill, occupy such a relation to the judgment based on the vendor lien note as would have given him the right of subrogation to the vendor's lien upon the land in favor of Park, had he, Peters, paid the judgment?

"2. If such right of subrogation would have existed in favor of Peters, under such conditions, then, after he conveyed all his estate to his niece, Mrs. Swoope, under the circumstances and conditions stated, did she occupy the same or as favorable attitude as Peters in regard to the matter of subrogation to the vendor's lien originally in favor of Park? Or, in other words, was she a volunteer, or did her assumption of all the debts and liabilities of said Peters, and the agreement to pay him the sum of \$2,000 a year so long as he should live, for his support, have the effect to prevent the right of subrogation in her on payment of such judgment?

"3. If it should be determined that Peters would have had the right of subrogation under the conditions stated, and that Mrs. Swoope occupied as favorable position after the conveyance by Peters of all his property to her, then did Tempe Darrow occupy a like position after the death of Mrs. Swoope, Mrs. Swoope having devised all of the Peters property to Tempe Darrow, and would she, Tempe Darrow, be entitled ¹⁰³ to subrogation to the vendor's lien in favor of Park, upon payment of his judgment against Summerhill?

"4. If the previous questions should be answered favorably to the claim of subrogation asserted in this suit by Tempe Darrow, then the further question arises, What period of limitation, two or four years, would apply to her right to enforce by suit such right of subrogation?

"5. If the right of subrogation would exist under the conditions stated, would equity preserve the life of the judgment in favor of Park against Summerhill for the purchase money of the land, and the vendor's lien securing the same, beyond the period when it would be barred by limitations, for the purpose of such subrogation?"

We answer the first question, if Peters had paid off the judgment in favor of Park against Summerhill in discharge of the injunction bond upon which Peters was surety, he would have been entitled to subrogation to the vendor's lien upon the land to secure him in the sum that he paid in discharge of the judgment: *Cannon v. McDaniel*, 46 Tex. 303; *Slaughter v. Owens*, 60 Tex. 668; *Beck v. Tarrant*, 61 Tex. 402; *King v. Brown*, 80 Tex. 276; *Mustain v. Stokes*, 90 Tex. 358.

Under the statute of Alabama, the bond upon which Peters was surety for Summerhill was conditioned that the obligors should pay the amount of the judgment enjoined, and, upon the

dissolution of the injunction, the bond operated as a judgment against the obligors and authorized the issuance of execution for the amount of the judgment, interest, and costs. The sum to be paid was that mentioned and secured by the judgment of *Park v. Summerhill*, which was for the amount of the debt secured by the note given by Summerhill to Park for a part of the purchase money of the land. The money secured by the injunction bond was part of the debt contracted in the purchase of the land, although it had assumed different forms.

In the case of *Slaughter v. Owens*, 60 Tex. 668, cited above, the court said: "There is no principle better settled than that the vendor's lien secures the debt contracted for the purchase money and not merely the note by which such debt is evidenced. This note may be substituted by another or it may pass into judgment, still the lien will attach to the new security, for that is but evidence of the original indebtedness. Hence, when judgment was obtained upon the note given by Lee and Calvert, that judgment carried with it the vendor's lien which originally secured the note itself. . . . We think the lien followed the debt, even to the judgment obtained upon the note given for the purchase money, and, as that was not barred, limitation had not deprived the plaintiff of remedy against the purchaser of the land."

To the second question we answer, that if Mrs. Swoope assumed the payment of the judgment in favor of Park against Summerhill so as to make her primarily liable and to give her no right of action against him, a payment made by her would have operated as an extinguishment of the debt, and, having no right of action against Summerhill for the debt, there could be no subrogation to the creditor's lien: *Douglass v. Fagg*, 104 8 Leigh, 588; *Goodyear v. Goodyear*, 72 Iowa, 329; *Kellogg v. Colby*, 83 Iowa, 513.

The recital in the conveyance from Peters that Mrs. Swoope assumed the liability of Peters became her contract when she accepted the conveyance, the same as if it had been written separately and signed by her: *Crawford v. Edwards*, 33 Mich. 354. The question to be determined is, Did the contract constitute Mrs. Swoope the principal in the debt as between herself and Summerhill, or did it give her the standing of a surety for Summerhill instead of Peters, whose place she took?

The injunction bond was a liability of Peters contingent upon the dissolution of the injunction and upon a failure of Sum-

merhill to pay. Mrs. Swoope assumed that, and, if it be held that she became the principal in the debt, a greater responsibility will be cast on her than rested upon Peters. But she assumed only so much as Peters was liable for and became the surety of Summerhill, liable to pay the judgment if the injunction should be dissolved and he should fail; and if she had made payment, it would have discharged a debt of her principal in which she would not be a volunteer, for she and her property were bound for it. She would have a right to recover from Summerhill the sum paid, and, to secure reimbursement, would be subrogated to the vendor's lien: *McDaniels v. Flower Brook Mfg. Co.*, 22 Vt. 274; *Rittenhouse v. Levering*, 6 Watts & S. 190; *Elwood v. Deifendorf*, 5 Barb. 398; *Rodgers v. M'Cluer*, 4 Gratt. 81, 47 Am. Dec. 715; *Leake v. Ferguson*, 2 Gratt. 419.

By the conveyance Peters vested the title to the property in Mrs. Swoope, and, if she had paid the judgment as between her and Peters, it would have been the discharge of her own debt with her own property. He would have had no right to recover against Summerhill. If she had done what he agreed to do, no sound reason can be given why she should not be subrogated to all of the rights that Peters would have had if he had paid under the same circumstances.

In the case of *McDaniels v. Flower Brook Mfg. Co.*, 22 Vt. 274, before cited, one Clark and other persons, stockholders in a company, became sureties upon its notes secured by mortgage upon real estate. The other sureties conveyed to Clark their stock, and, in consideration of the conveyance, he assumed their liability upon the notes. Afterward, to secure the original notes, Clark gave a collateral note with *McDaniels* as his surety. Clark became insolvent and *McDaniels* was compelled to pay the notes of the company. He sued the company for the amount paid, claiming subrogation to the mortgage. The court said: "The right of John M. Clark to keep this mortgage on foot will no doubt depend, then, essentially upon the effect of the contract by which he undertook to pay the debts of the corporation and this among them. If this made the debt essentially his own debt as between himself and the corporation, so that he became principal and they but sureties, then, upon paying it, either by himself or his sureties, he could not set it up or keep it on foot against his sureties. But we are not prepared to say that the contract of the 8th of February, 1843,

can or ought to be so construed as to have such ¹⁰⁵ effect. It seems, in terms and in fact, to be nothing more than an arrangement among the sureties by which John M. Clark, in consideration of the assignment of certain stock from the other sureties, undertook to save them harmless from all their liabilities on behalf of the corporation. After this, upon payment of the note, he clearly could not set it up against them or their property, had that been mortgaged for the payment; nor could his surety or the assignee of such surety. But, as to the corporation, he was still but a surety. He had received no consideration from them to pay this debt nor had he bound himself to pay it for them. If he had suffered the real estate to go upon the mortgage to Delano, the company could not complain; and having paid, he may now keep it on foot and so may his surety or the plaintiff who stands in his place. It is clear, then, that the plaintiff may recover against the corporation." The other cases cited support this, and we think the reasoning unanswerable. Mrs. Swoope became simply a substitute for Peters as surety for Summerhill, and, upon payment of the debt, would have been entitled to be subrogated to the vendor's lien.

Mrs. Darrow received the property from Mrs. Swoope as her devisee, and was substituted to all of her rights in connection therewith. We therefore answer the third question, that Mrs. Darrow was entitled to be subrogated to the lien in favor of Park to secure the amount that she paid upon the judgment.

To question fourth we reply that Mrs. Darrow's right of action was upon the implied contract arising between herself and Summerhill, which was not evidenced by writing and is subject to the bar of two years' limitation: Rev. Stats., art. 3354, subd. 4; *Faires v. Cockerell*, 88 Tex. 428.

We answer the fifth question, that equity will not suspend the statute of limitations in favor of one who seeks subrogation to such lien. Action upon the debt must be brought within the statutory period: *Rittenhouse v. Levering*, 6 Watts & S. 190. There is no reason why Mrs. Darrow should not have brought her suit to enforce her rights in this instance that would not apply with equal force to a suit against Summerhill if he were living. The purchasers from Summerhill have the right to plead against the debt sought to be enforced the period of limitation which Summerhill could plead if he were living and a party to the suit, and the same period of limitation must

apply in the one case as in the other: *McKeen v. James*, 87 Tex. 193; *Cason v. Chambers*, 62 Tex. 305.

SUBROGATION—LIMITATION OF ACTIONS.—The right of a surety who has paid the debt of his principal to be subrogated to any securities held by the creditor as additional security for the debt, may become barred by lapse of time: *Zuellig v. Hemerile*, 60 Ohio St. 27, 71 Am. St. Rep. 707. See, further, the note to *Scott v. Nichols*, 61 Am. Dec. 504-507.

THOMPSON v. ROBINSON.

[93 Texas, 165.]

VENDOR AND PURCHASER—FORECLOSURE OF VENDOR'S LIEN—RIGHTS OF PURCHASER.—Where a vendor of real property, who retains the superior title to the land, sells the land upon foreclosure of his vendor's lien, the purchaser becomes the owner of the legal title and the debt for the purchase money, by subrogation, with the same rights as the vendor as against purchasers of the vendee, who had not been made parties to the foreclosure suit.

VENDOR AND PURCHASER—FORECLOSURE OF VENDOR'S LIEN—RIGHTS OF PRIOR PURCHASER FROM VENDEE.—The foreclosure of a vendor's lien does not affect the rights of prior purchasers from the vendee, who are not parties to the suit, and they may perfect their title by paying to the purchaser at the foreclosure sale the purchase money paid by her.

VENDOR AND PURCHASER—DEFAULT IN PAYMENT—RIGHT OF PURCHASER AT FORECLOSURE.—The owner of the superior title to land and the debt for the purchase money, acquired at a sale upon foreclosure of the vendor's lien, may disaffirm the original contract of sale, as against purchasers from the vendee who are in default of payment for fifteen years, though not parties to the foreclosure suit, and convey to another, if the circumstances do not make it inequitable to do so.

VENDOR AND PURCHASER—DISAFFIRMANCE OF CONTRACT WITHOUT NOTICE.—A vendor who has waived a failure by his vendee to perform his contract is generally required to give notice to the vendee, demanding performance within a given time, before he can disaffirm his contract and resume possession and ownership of the land; but where the vendee and his heirs have failed to pay the interest or any part of the principal for thirty-two years, and for twenty-four years his widow and heirs have resided outside the state, so that there was no opportunity to give notice to them, no notice to perform is required before the vendor can abandon his contract.

VENDOR AND PURCHASER—DEFAULT OF VENDEE—WAIVER.—The foreclosure of a vendor's lien constitutes a waiver of the vendor's right to rescind the contract of sale for a prior failure to perform the contract, but it does not relieve the vendee, or purchasers from him who were not parties to the foreclosure

suit, from the obligation thereafter to perform the contract within a reasonable time; hence a failure to offer to perform for more than fifteen years gives the vendor the right to abandon the contract without notice to the purchasers and to convey the land as his own.

Ogden & Terrell and Denman, Franklin, Cobbs & McGowan, for the plaintiffs in error.

J. A. Buckler and Harris & Smith, for the defendants in error.

¹⁶⁷ BROWN, A. J. This suit was instituted by Eliza J. Robinson, Joshua D. Robinson, and Jennie P. Whitney, formerly Jennie P. Robinson, joined by her husband, E. Herbert Whitney, in the district court of Bexar county, against Benjamin R. Thompson, R. A. Brantley, E. A. Felder, John P. Randolph, T. M. Orr, A. B. Coryell, Lawrence Cole, Thomas Upton, H. O. Skinner, and G. H. Forcke, to recover lot No. 14, in range 3, in the city of San Antonio, containing twenty-six and sixty-nine one-hundredths acres of land. The city of San Antonio was subsequently made a party to the suit. The original suit was brought in the form of an action of trespass to try title, but subsequently, in 1895, what is termed a supplemental petition was filed in which the facts were alleged as hereafter shown by the findings of the court, and in which the plaintiffs claim the right to pay off the amount bid by the defendants at the sheriff's sale, and also offer to pay any balance due upon ¹⁶⁸ the original contract and any taxes that might be shown to have been paid by the defendants.

The defendants pleaded generally, denying the right of the plaintiffs and stale demand against the claim asserted. Some of the defendants pleaded over against their warrantors and made them parties to the suit, seeking to recover against them upon the warranty deeds in case the plaintiffs should recover the land or any part of it. The case was tried in the district court without a jury.

The city of San Antonio sold and conveyed the land in controversy to Gustav Schleicher by a written contract, signed by both parties, dated the sixth day of May, 1854. The conveyance was in the usual terms, but embraced a promise by Schleicher to pay to the city five hundred and twenty-six dollars, the balance of the purchase money of this and other lands conveyed in the same instrument, with eight per cent interest from the first day of February, 1854, payable semi-annually on the first days of February and August of each

year. To secure the payment of the money a vendor's lien was expressly retained, and the contract created a special mortgage upon the land. It was stipulated that Schleicher might pay off any part or the whole of the purchase money at any time before the expiration of fifty years, and, if he should fail to pay any installment of interest when due, the whole should at once become due, and that judgment might be rendered for the balance, foreclosing the lien upon the land, and it sold to pay the judgment. The contract provided that whenever the debt and interest should be paid, the vendor's lien and mortgage would be released.

On the fifteenth day of February, 1855, Schleicher, for a valuable consideration, conveyed the land in controversy to M. A. Dooley by warranty deed, excepting from the warranty the contract with the city of San Antonio. The deed was recorded on the seventeenth day of February, 1856, in the deed records of Bexar county, Texas.

On November 15, 1858, Dooley conveyed the land to Joshua D. Robinson by deed, which was duly recorded on the seventeenth day of November, 1858, in the records of Bexar county. Joshua D. and Eliza J. Robinson were married in 1857.

Joshua D. Robinson died in San Antonio, Texas, on the sixteenth day of September, 1866, leaving Eliza J. Robinson, his surviving widow, and two children, Joshua D., Jr., and Jennie P. Robinson, now Whitney. Jennie P. was born July 25, 1865, and was married in the year 1881 to Edward Herbert Whitney. Joshua D., Jr., was born on the third day of April, 1866. Mrs. Robinson, with her two children, resided in Texas until 1870, when she removed with them to the state of Massachusetts, where they have since resided.

In the year 1868, A. O. Cooley was appointed administrator of the estate of Joshua D. Robinson, deceased, in Bexar county; the administration was closed in the year 1882. The property in controversy was put on the inventory of the estate and appraised. The administrator did not pay the taxes upon this land and no disposition was made of it. ¹⁰⁰ While Cooley was administrator he called the attention of the city authorities of San Antonio to the claim of Robinson to the property, but was unable to get any action by the city with reference thereto, "or reply, except that they knew of no claim by the city against the said Robinson or the said land and knew nothing of Robinson's title thereto."

Default in payment of interest on Schleicher's obligation occurred in the year 1855, and no interest was paid after that date. In the year 1870 the city of San Antonio instituted suit in the district court of Bexar county against Schleicher and others, whose names do not appear, to recover the balance due upon the contract and to foreclose the lien upon the land in question and other lands named in the judgment. Neither the administrator upon the estate of Robinson, the widow, nor heirs of Robinson, were made parties to the suit or had any knowledge of its existence. On the 31st of January, 1874, by agreement between the city of San Antonio and Schleicher, judgment was rendered in favor of said city against G. Schleicher for the sum of one hundred and fifty dollars, with interest thereon at eight per cent per annum from the first day of February, 1855, amounting in the aggregate to the sum of three hundred and seventy-eight dollars, together with costs of suit. The vendor's lien and special mortgage reserved in the contract were foreclosed upon the following described property: "Lots Nos. 10 and 14, range 3, in district 1, of the plan of the city lands of the city of San Antonio, made and surveyed by Francis Giraud, city surveyor; lot No. 10, containing fifty-six and ten one-hundredths acres, and lot No. 14, containing twenty-six and sixty-nine one-hundredths acres, more or less, the same being situated in the county of Bexar, in the corporate limits of the city of San Antonio." Under an order of sale issued to the sheriff of Bexar county upon that judgment, the lands described were sold to different parties, and Ann Eliza Bohnet became the purchaser of the lot in controversy at the sum of two hundred and fifteen dollars. From the sale of this land and the other lands the entire judgment of the city was paid off. Mrs. Ann Eliza Bohnet paid the sum bid and received the sheriff's deed therefor on the seventh day of April, 1875. The plaintiffs tendered to the defendants, on the ninth day of May, 1896, the sum of two hundred and fifteen dollars, with eight per cent interest from the 7th of April, 1875, which was refused. This land was sold by the guardian of the minor heirs of Ann Eliza Bohnet to W. A. Bohnet, who, with J. A. Bohnet, conveyed it to Benjamin R. Thompson on August 27, 1890, from whom the other defendants claim by alleged warranty deeds.

The trial court entered judgment against all of the plaintiffs that they take nothing by the suit, which the court of civil appeals of the fourth district reversed as to Joshua D. Robin-

son, Jr., giving judgment in his favor for one-fourth of the land, and that he pay to the defendants one-fourth of two hundred and fifteen dollars, with eight per cent interest from the seventh day of April, 1875.

Plaintiffs in error present a number of objections to the judgment of the court of civil appeals which will not be examined, since we are of ¹⁷⁰ opinion that court erred in reversing the judgment of the district court as to Joshua D. Robinson, Jr., because the facts found by the trial court show that, when the suit was filed, he had no title to the land.

The contract of sale between the city of San Antonio and Gustav Schleicher being executory, the superior title to the land remained with the city, and the attempted foreclosure of the vendor's lien in the suit against Schleicher and the sale of the land under that judgment passed the legal title to the purchaser, Ann Eliza Bohnet. The entire debt of the city of San Antonio was paid by the sale of this and other lands, and, by subrogation, Mrs. Bohnet became the owner of the part of the debt which constituted a lien upon this lot. Being owner of the legal title to the land and the debt for the purchase money, she stood in the place of the city, and her rights passed to W. A. Bohnet through his purchase from her heirs: *Bradford v. Knowles*, 86 Tex. 505; *Ufford v. Wells*, 52 Tex. 612; *Stone Land etc. Co. v. Boon*, 73 Tex. 548; *Foster v. Powers*, 64 Tex. 247.

Joshua D. Robinson, Sr., being dead at the time the suit against Schleicher was instituted, and neither his administrator nor heirs being parties to that suit, the judgment of foreclosure and the sale did not affect their interest in the land, but they had the right to pay to Mrs. Bohnet the purchase money paid by her, and thereby perfect their title: *Pierce v. Moreman*, 84 Tex. 596; *Ufford v. Wells*, 52 Tex. 612. The plaintiffs below being in default of such payment for fifteen years, Bohnet, the owner of the superior title and the debt, had the right to disaffirm the contract and convey the land to B. R. Thompson, if the circumstances did not make it inequitable for him to do so: *Howards v. Davis*, 6 Tex. 174; *Wheatley v. Griffin*, 60 Tex. 209; *White v. Cole*, 87 Tex. 500; *Hatch v. Cobb*, 4 Johns. Ch. 559; *King v. Wilson*, 6 Beav. 126; *Smith v. Lawrence*, 15 Mich. 499; *Younger v. Welch*, 22 Tex. 426.

White v. Cole, 87 Tex. 500, was based upon these facts: Mrs. White became owner of a note given by Cole for the purchase money of land, the lien being expressly reserved in the deed to

Cole. After the note was barred, Mrs. White sued Cole upon it; he pleaded the statute of limitations, after which the original vendor conveyed the land to Mrs. White, who amended her petition and claimed the land. This court held that she could recover. The decision rests upon the proposition that, being owner of the debt and of the superior title to the land, Mrs. White had all the rights that belonged to the original vendor. W. A. Bohnet held the superior title and the purchase money debt as effectually as if the contract had been assigned and the land conveyed to him by the city, and no sound reason occurs to us why he did not stand in the same relation to the heirs of Joshua D. Robinson that Mrs. White sustained to Cole. If he could have recovered the land by suit, he could convey it.

It is frequently said that when a vendor has waived a failure by the vendee to perform, he may subsequently give notice to the vendee, demanding performance within a given time, and, upon failure, may abandon ¹⁷¹ the contract and resume possession and ownership of the land. Whenever it would be unjust for the vendor to disaffirm without notice to the vendee, a court of equity will require that notice should be given. But in this case, Joshua D. Robinson became the owner of Schleicher's right to this land in 1858, and neither he nor his heirs ever paid the interest or any part of the principal for thirty-two years. Robinson died in 1866, and his widow and children removed to the state of Massachusetts and continued to reside there, so that there was no opportunity for W. A. Bohnet to give notice to them, if it would otherwise have been necessary, which we think, under the circumstances, it was not.

It is true that by the suit against Schleicher the city of San Antonio waived the right to rescind the contract of sale for any antecedent failure of Robinson or his heirs to make payment, but it did not relieve them from the obligation thereafter to perform the contract within a reasonable time: *Scarborough v. Arrant*, 25 Tex. 129. More than fifteen years elapsed between the purchase by Mrs. Bohnet and the sale by W. A. Bohnet to Thompson, during which time the land had greatly increased in value, and no claim had been asserted by the heirs of Robinson, nor was there any offer of performance by them. They lived in another state far from the land, and Bohnet had received nothing from them to be accounted for. Under these circumstances, he had the right to abandon the contract and to convey the land as his own, without notice to the defendants in error. We therefore hold that the deed from W. A. and J. A.

Bohnet to B. R. Thompson conveyed the legal and equitable title to the land, free from any claim of the heirs of Joshua D. Robinson, and the court of civil appeals erred in reversing the judgment of the district court as to Joshua D. Robinson, Jr., for which error the judgment of the court of civil appeals is reversed and the judgment of the district court is affirmed.

VENDOR AND PURCHASER.—A vendee in a contract for the purchase of land is not compelled to go out of the state to notify the vendor that he renounces the contract: *Taylor v. Porter*, 1 Dana, 421, 25 Am. Dec. 165. As to the rights of a vendee upon the rescission of a contract to convey land, see the note to *Richardson v. McKinson*, 12 Am. Dec. 812-814. As to the forfeiture of a vendee's rights, see the notes to *Wells v. Smith*, 31 Am. Dec. 278, 279; *Smith v. Mariner*, 68 Am. Dec. 87.

BULLOCK v. SPROWLS.

[93 Texas, 188.]

MINORS—DISAFFIRMANCE OF CONTRACT.—A minor is not required, as a condition of disaffirming his conveyance of land and recovering the same, to restore a consideration received for it which was not in his possession or control when he arrived at full age, but which had been wasted by him during his minority.

MINORS — DISAFFIRMING CONTRACT — RESTORING CONSIDERATION.—One disaffirming his deed on the ground that it was executed when he was a minor must restore the consideration if it is still in his possession or within his control, or if he has used it during minority for purposes for which the law would permit him to charge his estate, as for necessities.

A. H. Field and Jeff Word, for the plaintiff in error.

Harry P. Lawther, for the defendant in error.

¹⁸⁹ **WILLIAMS, A. J.** The facts affecting the question on which this writ of error was granted are the following: Defendant in error, Sprowls, on the third day of February, 1894, being a minor seventeen years of age, agreed with his step-father, E. J. Allen, to buy a fifth interest in a mercantile business which the latter owned, and, in order to raise money to pay for it, proposed to sell to plaintiff in error, Bullock, the one-sixth interest now in controversy in land which he had inherited from his father. The parties met and discussed the proposition to sell the land to Bullock, who at first demurred on account of Sprowls' minority, but finally consented to buy

uang v. Null, 67 Tex. 465; Wade v. Love, 69 Tex. 522; Ferguson v. Houston etc. Ry. Co., 73 Tex. 344; Houston etc. Ry. Co. v. Ferguson, 73 Tex. 349. But we think these decisions do not go further than to state a general principle, the facts of the cases under consideration not requiring a more particular consideration of the subject for the purpose of defining the qualifications to which the rule might be subject. In all of them in which the right to disaffirm was denied, except Ferguson v. Houston etc. Ry. Co., 73 Tex. 344, other reasons for the judgment besides the failure to restore existed; and in several of them the rule was stated in general terms only by way of argument or illustration of other propositions. In none of them does any question appear to have been raised as to the disposition made by the minor of the consideration during his minority.

In the case of Ferguson v. Houston etc. Ry. Co., 73 Tex. 344, there was evidence to justify the conclusion that the party whose land was sold under a power of attorney executed by him while a minor received and appropriated the proceeds of property, in which the money received by the agent for the land had been invested for his benefit, after he had arrived at full age, and that he then delayed action to disaffirm the transaction for two years. The case was decided upon all of the facts, of which the failure to restore the purchase money was only one.

That one disaffirming his deed on the ground that it was executed when he was a minor must restore the consideration, if it is still in his possession or within his control, is a proposition about which there can be no doubt. It may also be true that if he has used it during minority for purposes for which the law would permit him to charge his estate, as for obtaining necessities, he must restore or account for its equivalent: Searcy v. Hunter, 81 Tex. 646, 26 Am. St. Rep. 837; Womack v. Womack, 8 Tex. 417, 58 Am. Dec. 119. If he has retained it until he reached full age and then appropriated it, this may be a sufficient reason, ordinarily, to preclude him from disaffirming the contract; or, if not to preclude him absolutely, to at least require him to pay its equivalent without inquiry as to the ¹⁹² purposes to which he has devoted it. What are the proper rules in such cases, as well as in those in which minors have deceived persons honestly dealing with them into buying their property in the belief that they are of full age, are questions which have no bearing upon this inquiry. The

trade in this case was made with full knowledge by all parties that Sprowls had no power to bind himself by his conveyance. The effect of it, if it is to stand, was to convert property which the law put it beyond his power to waste by injudicious management into money, which he could waste and has wasted.

If a recovery of the land is to be denied him until he shall restore an equivalent for the money which he has thus been enabled to dissipate, the purpose of the law will be defeated, and his estate will be taken to make good the money which the person dealing with him has put it in his power to squander through his lack of discretion. The disability laid upon minors to sell their property will afford small protection if purchasers may pay them money upon it, and, after it has been lost through extravagance or indiscretion, hold the property as a security for the return of the money. Proper consideration for the interests of parties who thus knowingly deal with minors does not demand that the purposes of the law in imposing the disability should be defeated. Losses which occur in such dealings are only what persons buying property from and paying money to minors should expect from their presumed incapacity to judiciously manage business affairs, and they are natural consequences of such risks which can furnish no good reason for denying to the minors the protection which it is the purpose of the law to give them.

We do not think it was ever the purpose of the learned judges who wrote the opinions in the cases cited to lay down a rule so broad that, in its operation, it would conflict with the leading principle which renders minors incapable of conveying away their property; but that it was only meant to state a general principle under which all persons would be protected from loss as far as this could be done consistently with the protection designed to be given to the interests of the minor.

Other courts have stated the rule quite as broadly as has been done in the previous cases in this court, and some of their decisions are cited in *Cummings v. Powell*, 8 Tex. 88, and *Kilgore v. Jordan*, 17 Tex. 356, but when circumstances such as exist in this case have arisen, the same courts have generally admitted the qualification that where the consideration has been wasted by the minor during his minority, he is not required to pay its equivalent as a condition of recovering property conveyed by him: *Badger v. Phinney*, 15 Mass. 363, 8 Am. Dec. 105; *Chandler v. Simmons*, 97 Mass. 508, 93 Am. Dec. 117; *Taft v. Pike*, 14 Vt. 405, 39 Am. Dec. 228; *Whitcomb v.*

Joelyn, 51 Vt. 79, 31 Am. Rep. 678; Roof v. Stafford, 7 Cov. 182; Hillyer v. Bennett, 3 Edw. Ch. 222; Green v. Green, 69 N. Y. 553, 25 Am. Rep. 233; Hill v. Anderson, 5 Smedes & M. 216; Harvey v. Briggs, 68 Miss. 60; Brantley v. Wolf, 60 Miss. 420; Craig v. Van Bebber, 100 Mo. 584, 18 Am. St. Rep. 569. The great weight of authority and, we think, the clear reason is in ¹⁹³ favor of this proposition: McGreal v. Taylor, 167 U. S. 688, where many of the authorities are cited.

We therefore conclude that the courts below rightly held that the plaintiff was not, under the circumstances appearing, required to pay to the defendant any sum before recovering the land.

Affirmed.

AN INFANT MAY AVOID HIS CONTRACT, upon arriving at majority, though he has wasted or consumed the consideration received for it: American Freehold etc. Co. v. Dykes, 111 Ala. 178, 56 Am. St. Rep. 88. He may avoid his contract without putting the other party in statu quo or returning the consideration, if the contract was not for necessities, nor necessarily beneficial to him: Dube v. Beaudry, 150 Mass. 448, 15 Am. St. Rep. 228. See the discussion of this subject in the monographic note to Craig v. Van Bebber, 18 Am. St. Rep. 687-694.

BARNETT v. SQUYRES.

[93 Texas, 193.]

EXECUTION SALE—UNRECORDED DEED.—As between a purchaser at an execution sale and a purchaser at a sale upon the foreclosure of a mortgage which was unrecorded at the time the lien of the judgment creditor was acquired, the burden is upon the person asserting his right under the unrecorded mortgage to show that the judgment creditor had notice of such mortgage prior to the acquisition of his lien.

H. L. Mosley, A. G. Boyle, and Alexander & Fain, for the plaintiff in error.

John W. Squyres, defendant in error, in his own behalf.

¹⁹³ WILLIAMS, A. J. This was an action of trespass to try title by Squyres against Barnett to recover the land in controversy. The answer was not guilty. Both parties claim under Spain Fondren, their titles being as follows: Spain Fondren, on the eighteenth day of February, 1896, executed to Squyres a mortgage on the land to secure a note executed at same time

by Fondren to Squyres, which mortgage was not recorded until February 2, 1897. It was foreclosed by judgment of the district court in October, 1897, and a sale of the land was thereafter made under this judgment, and Squyres became the purchaser and claims title under such purchase. On the sixteenth day of December, 1896, in the county court of Parker county, one Mrs. Rice recovered a judgment for money against Spain Fondren, and on same day caused an abstract thereof to be regularly filed and recorded in the office of the county clerk of that county, and subsequently caused a sale of the land in controversy under execution, as the property of Fondren, to be regularly made, at which Barnett became the purchaser and acquired such title as passed thereby.

¹⁰⁴ There was no evidence as to whether or not Mrs. Rice, before the recording of the abstract, had notice of the unrecorded mortgage to Squyres, but it was shown that her attorney and Barnett had notice of it before the issuance of the execution. The district court held that the burden was upon defendant to show affirmatively that Mrs. Rice had no notice of the mortgage when her abstract was recorded, in order to acquire a lien superior to the mortgage, and rendered judgment for the plaintiff. The court of civil appeals approved this view and affirmed the judgment.

The decisions of this court have determined the rule to be otherwise, placing the burden upon the person asserting right under the unrecorded instrument to show notice to the creditor prior to the acquisition of his lien: *Linn v. Le Compte*, 47 Tex. 442, 443; *Wright v. Lassiter*, 71 Tex. 644, 645.

Under the facts the defendant was entitled to judgment, and the judgments of the district court and of the court of civil appeals will be reversed and judgment will be rendered that plaintiff take nothing, etc.

EXECUTION SALE—UNRECORDED MORTGAGE.—Purchasers at an execution sale are protected against a prior unrecorded mortgage of which they had no notice: *McKnight v. Gordon*, 13 Rich. Eq. 222, 94 Am. Dec. 164. See, too, *Voorhis v. Westervelt*, 43 N. J. Eq. 642, 3 Am. St. Rep. 315; *Lusk v. Reel*, 36 Fla. 418, 51 Am. St. Rep. 32.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY v. HAYTER.

[98 Texas, 239.]

DAMAGES.—FOR MENTAL SUFFERING which is the result of physical injuries, negligently inflicted, damages may be recovered.

DAMAGES—RECOVERY FOR FRIGHT.—There can be no recovery for mere fright neither attended nor followed by any other injury.

DAMAGES—FRIGHT FOLLOWED BY PHYSICAL INJURY.—Where a physical injury results from a fright or other mental shock, caused by the wrongful act or omission of another, the injured party is entitled to recover his damages, provided the act or omission is the proximate cause of the injury, and the injury ought, in the light of all the circumstances, to have been foreseen as a natural and probable consequence thereof.

J. W. Terry, for the plaintiff in error.

Neyland & Neyland, T. D. Montrose, and Lee A. Clark, for the defendant in error.

240 GAINES, C. J. This suit was brought by the defendant in error against the plaintiff in error. He recovered a judgment which, upon appeal, was affirmed by the court of civil appeals.

The plaintiff was a passenger on a train of the Missouri, Kansas and Texas Railway Company which was struck by a freight train of the defendant company at a point where the road of the former company is crossed by that of the latter. He was seated in the smoking-car, and the train upon which he was riding was passing the crossing at the time the collision occurred. It was struck about the coupling between the chair-car and the sleeping-car. Among other things, he testified as follows: "That the Missouri, Kansas and Texas train had stopped for the crossing and was just moving forward when he saw the Santa Fe train approaching the crossing at a rapid rate of speed, at a distance therefrom of about one-quarter of a mile. I did not think at this time that there would be a collision. About the time the Katy train started over the track at the crossing, it suddenly moved forward with a jerk and increased speed; the whole of it got across the crossing except the chair-car and the sleeper; the Santa Fe train ran into the Katy train about the coupling between the chair-car and the sleeper; the Katy train came to a sudden stop, jarring plaintiff considerably, but he did not realize that he

was hurt until he got off the train. . . . The coach that plaintiff was sitting in did not leave the track, but the chair-car, ²⁴¹ which was next behind the car in which plaintiff was riding, and the sleeping-car, which was the rear car of the train, both left the track—were derailed; that plaintiff was not knocked off his seat, nor did the collision tear his hands loose from the hold he had taken, nor knock him from the seat, nor disturb his position any that he could tell, but it frightened him greatly." There was testimony tending to show that a serious nervous affection known as traumatic neurasthenia resulted from the accident, and that this may have been caused either by the physical shock or by the mental shock produced by fright, or by both. The trial court ruled and in effect charged the jury that if the negligence of the servants of the defendant company caused a collision between the two trains, "and . . . that as a direct result of said collision plaintiff received a mental shock or a physical injury, or both, that caused a disease or sickness to develop from which plaintiff has suffered physical pain and mental anguish; and . . . such negligence of the Santa Fe Company was the proximate cause of such disease or sickness," they should find a verdict for him.

The only error assigned in this court is "that the court of civil appeals erred in holding that the plaintiff can recover for injuries, the result of mere shock or fright, when the defendant had not inflicted any bodily injury and had caused no other disturbance to the plaintiff than such fright or shock."

The question thus presented is one upon which there is a decided conflict of authority. It is generally held that for mental suffering accompanying physical injuries, negligently inflicted, damages may be recovered; but many courts hold that for sickness, impairment of the mental faculties, or physical lesions which merely result from a mental emotion caused by the wrongful act or omission of another, but which do not accompany such mental emotion, no recovery can be had. This court has held that there can be no recovery for mere fright neither attended nor followed by any other injury: *Gulf etc. Ry. Co. v. Trott*, 86 Tex. 412, 40 Am. St. Rep. 866. But in *Hill v. Kimball*, 76 Tex. 210, which presented a similar question to that before us, we held that a recovery could be had for a miscarriage alleged to have been caused by a mental shock unaccompanied by any physical violence whatever to the person of the injured woman. That, however, was a very strong case; and when we granted the writ of error, we were in doubt

whether that decision justified the ruling of the trial court and of the court of civil appeals in the present case. We have therefore re-examined the question in the light of the very numerous authorities which have been presented by counsel, with the result that we have been unable to discover any substantial difference between the case where an injury has been inflicted through physical agencies and one in which a mental emotion constitutes one of the links in the chain of causes which have led to the injurious result. As has been pointed out by the supreme court of South Carolina, the courts which deny the right of recovery in the latter case are not in accord as to ²⁴² the ground upon which their conclusion is based: *Mack v. South Bound R. R. Co.*, 52 S. C. 323, 68 Am. St. Rep. 913. By some it is held that a physical injury is not a natural and probable consequence of a mental emotion, however potent, and that the injury in such case is one not reasonably to be anticipated. Others content themselves by saying, in effect, that a contrary ruling would result in a multiplication of damage suits and in intolerable and vexatious litigation. The uncertainty and obscurity attending the facts and the consequent difficulty of administering the law are also urged as an objection to allowing damages for such injuries. To our minds, neither proposition affords a sufficient reason for denying a recovery in these cases. This court has announced the doctrine that in order to constitute negligence, the act or omission must be the proximate cause of an injury, which, in the light of the attending circumstances, ought to have been foreseen as a natural and probable consequence of such act or omission: *Texas etc. Ry. Co. v. Bigham*, 90 Tex. 223. But in the light of modern science, nay, in the light of common knowledge, can a court say, as a matter of law, that a strong mental emotion may not produce in the subject bodily or mental injury? May not epilepsy or other nervous disorder or insanity result from fright? May not a miscarriage result from a mental shock? In several of the adjudicated cases in which the question under consideration has been passed upon there was a miscarriage caused by fright or other mental emotion: *Mitchell v. Rochester Ry. Co.*, 151 N. Y. 107, 56 Am. St. Rep. 604; *Renner v. Canfield*, 36 Minn. 90; *Rock v. Denis*, 4 Mont. 356; *Fitzpatrick v. Railway*, 12 U. C. Q. B. 645.

On the other hand, the reported cases would indicate that the litigations arising from injuries inflicted through a mental shock are not so numerous as to cause any considerable in-

crease of litigation. So that this objection, as it seems to us, rests upon an imaginary ground. It is true that in most cases it may be difficult to determine the extent of a mental shock and its result upon the physical system. But, in our opinion, this is not a sufficient reason for refusing a remedy for damages resulting from a wrong. The same difficulty exists in many other cases in which that objection has never been urged as a reason why a recovery should be denied.

We conclude that where a physical injury results from a fright or other mental shock, caused by the wrongful act or omission of another, the injured party is entitled to recover his damages, provided the act or omission is the proximate cause of the injury and the injury ought, in the light of all the circumstances, to have been foreseen as a natural and probable consequence thereof. In our opinion, as a general rule, these questions should be left to the determination of the jury.

The following cases are in accord with our views: *Bell v. Railway*, 26 L. R. Ir. 428; *Sloane v. Southern etc. Ry. Co.*, 111 Cal. 668; *Mack v. South Bound R. R. Co.*, 52 S. C. 323, 68 Am. St. Rep. 913; *Purcell v. St. Paul City Ry. Co.*, 48 Minn. 134; *Fitzpatrick v. Railway*, 12 U. C. Q. B. 645. In the following the contrary doctrine is laid down: *Spade v. Lynn etc. Ry. Co.*, 168 Mass. 285, 60 Am. St. Rep. 393; ²⁴³ *Ewing v. Pittsburgh etc. Ry. Co.*, 147 Pa. St. 40, 30 Am. St. Rep. 709; *Mitchell v. Rochester Ry. Co.*, 151 N. Y. 107, 56 Am. St. Rep. 604; *Victorian Ry. Commrs. v. Coultas*, L. R. 13 App. Cas. 222; *Braun v. Craven*, 175 Ill. 401.

For the reasons given, we think that the assignment points out no error, and, therefore, the judgment of the district court and that of the court of civil appeals are affirmed.

Fright as an Element of Recoverable Damages.*

This is but one branch of the general subject of damages for mental pain and suffering. "Mental agony" includes "peril" and "fright": *San Antonio etc. Ry. Co. v. Corley* (Tex. Civ. App., May 23, 1894), 26 S. W. Rep. 903. Mere mental anguish, as such, as an element of recoverable damages will not be treated, nor any of its branches, such as disappointment, injuries to feelings, indignities, insults, or feelings of humiliation and shame.

***REFERENCES TO MONOGRAPHIC NOTES.**

Mental anguish as an element of damages: 7 Am. St. Rep. 534-536; 30 Am. St. Rep. 712; 36 Am. Rep. 306-308.

Damages for mental suffering for delay in delivering telegraph messages: 66 Am. St. Rep. 873-875; 10 Am. St. Rep. 788-790.

Mental suffering in cases of wrongful attachment: 68 Am. St. Rep. 272, 273.

There can be no Recovery for Fright Alone, which is neither accompanied nor followed by injury. As to this the authorities are in harmony: *Gulf etc. Ry. Co. v. Trott*, 86 Tex. 412, 40 Am. St. Rep. 866; *Strange v. Missouri Pac. Ry. Co.*, 61 Mo. App. 586; *Stutz v. Chicago etc. Ry. Co.*, 73 Wis. 147, 9 Am. St. Rep. 769; *Mitchell v. Rochester Ry. Co.*, 151 N. Y. 107, 56 Am. St. Rep. 604; *Wyman v. Leavitt*, 71 Me. 227, 36 Am. Rep. 303. Mere fright caused by being placed in a perilous position by another cannot be the subject of damages. To warrant a recovery for fright, it must be accompanied by some actual injury caused thereby, and traceable directly thereto: *Atchison etc. R. R. Co. v. McGinnis*, 46 Kan. 109. Hence one who is compelled to leave a ferryboat cannot recover for mere fright caused by the company's negligence in failing to provide safe means of disembarking: *Southern Pac. Co. v. Ammons* (Tex. Civ. App., Apr. 5, 1894) 26 S. W. Rep. 135; and where the plaintiff's team which he was driving was frightened by the defendant's train and his wagon was broken, the fear and anxiety of mind which he suffered relative to his own personal safety were not elements of actual damage which could be considered in the absence of physical injury: *Gulf etc. Ry. Co. v. Trott*, 86 Tex. 412, 40 Am. St. Rep. 866.

Fright With Contemporaneous Injury.—The authorities appear to be almost equally harmonious upon the proposition that there may be a recovery for fright where there is a contemporaneous physical injury: *Ewing v. Pittsburgh etc. Ry. Co.*, 147 Pa. St. 40, 30 Am. St. Rep. 709; *Mitchell v. Rochester Ry. Co.*, 151 N. Y. 107, 56 Am. St. Rep. 604; *Consolidated Trac. Co. v. Lambertson*, 59 N. J. L. 297. In such a case the fright and its consequences may be considered in assessing the damages: *Cleveland City Ry. Co. v. Ebert*, 10 Ohio O. D. 291. Where actual personal injury has been inflicted, the jury may, in estimating the damages, take into consideration the anxiety and fear of the plaintiff at the time the injury was inflicted, naturally incident to the risk and danger of the occasion: *Masters v. Warren*, 27 Conn. 293. The same court in *Seger v. Barkhamsted*, 22 Conn. 290, said that the actual personal injury was not confined to the wounds upon the body, but extended to the mental suffering. "The dismay, and the consequent shock to the feelings, which is produced by the danger attending a personal injury, not only aggravate it, but are frequently so appalling as to suspend the reason and disable a person from warding it off; and to say that it does not enter into the character and extent of the actual injury, and form a part of it, would be 'an affront to common sense.'" Hence in an action for injury due to the bite of a dog, the fear and solicitude as to poison are proper elements of damage: *Godeau v. Blood*, 52 Vt. 251, 36 Am. Rep. 751. And where a passenger was carried beyond her destination in the night-time, and the conductor, knowing the danger, directed her to leave the train at a point several hundred feet from the platform of the depot of her destination, and she was thus compelled to walk along

a sidetrack, in which there was an open culvert into which she fell and was injured, and while endeavoring to extricate herself she was frightened by the backing of trains on the track toward her, it was held that she could recover for the fright sustained: *Stutz v. Chicago etc. Ry. Co.*, 73 Wis. 147, 9 Am. St. Rep. 769. The anxiety and distress of mind fairly caused by an injury are properly considered in estimating the damages sustained: *Pittsburgh etc. Ry. Co. v. Sponler*, 85 Ind. 165. But the fright must be connected with the wrongful act of the defendant toward the plaintiff. Hence, where a person shoots a dog in the highway, and a woman standing near, whom he does not see at the time he fires, is so badly startled and frightened by the report of the gun as to seriously affect her health, the killing of the dog is in no sense the proximate cause of the injury to the woman. There was no tort of any kind against the woman: *Renner v. Canfield*, 36 Minn. 90, 1 Am. St. Rep. 654. And where an unavoidable battery is committed upon a passenger in a street-car by the act of the conductor in ejecting a drunken man, the pain and fright occasioned by the battery may, perhaps, be recovered for, but the fright due to the general disturbance caused by the presence of the drunken man in the car cannot be considered: *Spade v. Lynn etc. R. R. Co.*, 172 Mass. 488, 70 Am. St. Rep. 298. In *Warren v. Boston etc. R. R.*, 163 Mass. 484, the court sustained an instruction to the effect that if the defendant was guilty of a tortious act, then the jury, in estimating the damage suffered, might take into account the fright, the nervous shock, and the results that followed. In this case it appeared that the plaintiff while driving in his carriage was shut in between the gates of a railroad crossing, his carriage was struck by the defendant's train and he was thrown to the ground. The court said that to be thrown out of a wagon, or to be compelled to jump out, was a physical injury to the person, although the harm done consisted mainly of nervous shock. The rule that there can be no recovery for fright unless connected with a contemporaneous physical injury was applied in *Deming v. Chicago etc. Ry. Co.*, 80 Mo. App. 152, where a passenger was carried beyond her destination and put off in the darkness, and it was held that sickness resulting from fright, worry, and overtaxation of strength after leaving the train would not justify a recovery. In *O'Flaherty v. Nassau Elec. R. R. Co.*, 84 N. Y. App. Div. 74, the plaintiff was thrown down by an electric wire of the defendant, which caused an electric shock and great fright, the whole causing her injured physical condition, and the court sustained a recovery on the ground that fright accompanied by physical injury furnished the basis for a recovery of damage. In *Consolidated Trac. Co. v. Lamberton*, 59 N. J. L. 297, a recovery was sustained where the plaintiff's wagon, in which he was riding, was struck by a car going at great speed, and was carried along for some distance, which so frightened the plaintiff that it resulted in an impairment of his health, although there was no actual physical

impact upon his person. Even where the sole physical injury arises from an attempt to escape from actual danger, this is a sufficient contemporaneous injury that will allow a recovery for the impairment of health occasioned by the consequent fright: *Consolidated Trac. Co. v. Lambertson*, 59 N. J. L. 297. Thus, where a woman was obliged to throw herself on a railroad platform to escape being struck by a piece of timber projecting from a car in motion, and her health was impaired by the fright thus occasioned, she was held to be entitled to recover: *Buchanan v. West Jersey R. R. Co.*, 53 N. J. L. 265. And where the defendant's train, on which the plaintiff was a passenger, ran off the track, and the plaintiff, alarmed at the peril, endeavored to escape and in so doing was injured, it was held that any injury to her health or person occasioned by her fright, or by her striking the ground, would be directly traceable to the derailment as its primary, proximate, responsible, and juridical cause, for which she could recover: *Smith v. St. Paul etc. Ry. Co.*, 30 Minn. 169. See, also, *Mark v. St. Paul etc. Ry.*, 30 Minn. 493.

No Recovery for Fright Which Causes Injury.—The great weight of authority is against the rule laid down by the principal case, and sustains the doctrine that there can be no recovery for fright which results in physical injury, in the absence of contemporaneous injury to the plaintiff: *Spade v. Lynn etc. R. R. Co.*, 172 Mass. 483, 70 Am. St. Rep. 298; *Trigg v. St. Louis etc. Ry. Co.*, 74 Mo. 147, 41 Am. Rep. 305; *Victorian Ry. Commrs. v. Coultas*, L. R. 18 App. Cas. 222; *Ewing v. Pittsburgh etc. Ry. Co.*, 147 Pa. St. 40, 30 Am. St. Rep. 709; *Braun v. Craven*, 175 Ill. 401. These cases follow the rule that there can be no recovery for mere fright, terror, alarm, or distress of mind if they are unaccompanied by some physical injury, and say that there can be no recovery for physical injuries which are caused solely by such mental disturbance, in the absence of personal injury from without: *Spade v. Lynn etc. R. R. Co.*, 168 Mass. 285, 60 Am. St. Rep. 393. If fright is not a ground of recovery, its effects are not: *Trigg v. St. Louis etc. Ry. Co.*, 74 Mo. 147, 41 Am. Rep. 305. And this rule cannot be avoided by calling the negligence gross and alleging that the defendant ought to have known that the result complained of would follow his act: *Smith v. Postal Tel. Cable Co.*, 174 Mass. 576, 75 Am. St. Rep. 374. The courts find it difficult to understand how a defendant would be liable for the consequences of fright when it is admitted that no recovery can be had for fright alone. The principle is not changed, they say, though the result may be nervous disease, blindness, insanity, miscarriage, or anything else. "These results," said the court in *Mitchell v. Rochester Ry. Co.*, 151 N. Y. 107, 56 Am. St. Rep. 604, "merely show the degree of fright or the extent of the damages. The right of action must still depend upon the question whether a recovery may be had for fright. If it can, then an action may be maintained, however slight the injury. If not, then there

can be no recovery, no matter how grave or serious the consequences."

One main reason why such actions are not sustained is because the result is not the proximate cause of the defendant's act. Persons who are merely negligent are not bound to anticipate and guard against fright and the consequences thereof: *Spade v. Lynn etc. R. R. Co.*, 168 Mass. 285, 60 Am. St. Rep. 393. In *Braun v. Craven*, 175 Ill. 401, it was said that the courts which allow a recovery for mere fright and the resulting physical injury lose sight of the only safeguard against imposition in negligence cases, which is the elementary rule that a plaintiff must show a damage naturally and reasonably arising from the negligent act and which was reasonably to be anticipated as a result. Thus, in *Phillips v. Dickerson*, 85 Ill. 11, 28 Am. Rep. 607, a married woman sought to recover damages for fright which caused a miscarriage. The fright was caused by a quarrel between the defendant and the plaintiff's husband and another, the fear growing out of the violence of the defendant. The quarrel was within her hearing, but out of her sight, and it did not appear that the defendant knew that she heard it, or knew of her condition. The court said that the defendant had no reason to apprehend that what took place would occasion danger through fright to some third person, who was not present, and the result complained of was not such a consequence as, in the ordinary course of things, would flow from his conduct, and hence could not be held liable. And where the plaintiff was about to board a street-car of the defendant, and a horse-car approached at the same time so close to her that she stood between the horses' heads when it was stopped, it was held that the fright which resulted in a miscarriage was not the proximate result of the defendant's negligence. "The injuries to the plaintiff, in such a case," said the court in *Mitchell v. Rochester Ry. Co.*, 151 N. Y. 107, 56 Am. St. Rep. 604, "were plainly the result of an accidental or unusual combination of circumstances, which could not have been reasonably anticipated, and over which the defendant had no control, and, hence, her damages were too remote to justify a recovery."

The danger of opening the door to imaginary and fictitious claims, if the rule should be adopted permitting a recovery for mere fright and its consequences, has greatly influenced the courts in rejecting this rule: *Victorian Ry. Commrs. v. Coultas*, L. R. 13 App. Cas. 222. It was suggested in *Wyman v. Leavitt*, 71 Me. 227, 36 Am. Rep. 303, that "if the law were otherwise, it would seem that not only every passenger on a train that was personally injured, but everyone that was frightened by a collision or by the trains leaving the track could maintain an action against the company." The court, however, refrains from giving a direct opinion as to whether a fright sufficiently severe to produce a physical disease would support an action. The danger of fraud in instituting such claims was pointed out in *Mitchell v. Rochester Ry. Co.*, 151 N. Y. 107, 56 Am. St. Rep. 604,

and for this reason the doctrine allowing suits to recover for fright and its results was deemed to be against public policy. To establish a right of recovery in such cases, the court said, would result in a flood of litigation in cases where the injury complained of could be easily feigned without liability of detection, and the damages resulting would be a mere matter of conjecture or speculation: See, also, *Braun v. Craven*, 175 Ill. 401. The real reason for denying relief in such cases was said, in *Spade v. Lynn etc. R. R. Co.*, 168 Mass. 286, 60 Am. St. Rep. 393, to rest upon the ground that in practice it was impossible to satisfactorily administer such a rule. Law must be administered according to general rules, and to permit a recovery for fright and its consequences would seem to require the adoption of a special rule for each particular case, depending on the sensitiveness of the individual injured. "As the law is a practical science," said the court, "having to do with the affairs of life, any rule is unwise if, in its general application, it will not as a usual result serve the purposes of justice. . . . As a general rule, a carrier of passengers is not bound to anticipate or to guard against an injurious result which would only happen to a person of peculiar sensitiveness. One may be held bound to anticipate and guard against the probable consequences to ordinary people, but to carry the rule of damages further imposes an undue measure of responsibility upon those who are guilty only of unintentional negligence."

In *Lehman v. Brooklyn City R. R. Co.*, 47 Hun, 355, the plaintiff, who was a married woman in a state of pregnancy, was standing in her doorway, when the defendant's horse, which had run away, dashed up the street at a high rate of speed. The horse plunged toward the woman, but was stopped by running against a post. The plaintiff was not touched by the horse, but sustained a severe shock from her fright, which brought on a long train of nervous diseases, and the court held that no action could be maintained. In *Ewing v. Pittsburgh etc. Ry. Co.*, 147 Pa. St. 40, 30 Am. St. Rep. 709, it appeared that there was a collision of cars upon the defendant's road, some of which were thrown from the track and fell against the plaintiff's house, greatly frightening her, as a result of which she became sick and disabled. The court denied a recovery on the ground that the accident was not the proximate cause of the injury. The defendant, said the court, owed the plaintiff no duty to protect her from fright, and it had no reason to anticipate that a collision on its road would so act upon the mind of one who saw it as to produce nervous excitement and distress resulting in permanent injury. An opposite decision was reached in the very similar case of *Yoakum v. Kroeger* (Tex. Civ. App., Oct. 10, 1894), 27 S. W. Rep. 953. In *Nelson v. Crawford* (Mich., Dec. 21, 1899), 81 N. W. Rep. 335, the defendant, who was dressed in woman's clothes, went to the plaintiff's residence, whom he frightened by following her into her house and striking the floor with his parasol. The

fright caused a miscarriage. The defendant did not attempt an assault and did not intend any wrong, and the court held the better rule to be that no recovery could be allowed in the absence of a contemporaneous physical injury. Physical injury resulting from fright is not a contemporaneous injury which will sustain a suit for damages: *Deming v. Chicago etc. Ry. Co.*, 80 Mo. App. 152.

What Constitutes Injury.—The rule requiring a contemporaneous physical injury in order to sustain a recovery for fright and its consequences is easily satisfied in some jurisdictions, and is not as severe as would appear at first sight. In *Canning v. Williamstown*, 1 Cush. 451, it was said that any injury, however slight, was sufficient. In this case a bridge maintained by the defendant town was defective, and gave way while the plaintiff was driving across it in a light carriage. His cheek was slightly injured, but the main damage was due to the fright and mental suffering occasioned by the accident, and the court held the town liable for such mental anguish. In *Warren v. Boston etc. R. R.*, 163 Mass. 484, the plaintiff was shut in between the gates of a railroad crossing, through the negligence of the operator, and the buggy in which he was driving was struck by a train, and he was thrown out upon the ground. No great injury, aside from the fright and its consequences, resulted. The court in sustaining the action held that a person suffers a physical injury where he is thrown from his buggy by an approaching train or where he is compelled to jump out. *Consolidated Trac. Co. v. Lambertson*, 59 N. J. L. 297, is a somewhat similar case. Here the defendant's electric-car was running at great speed and struck the wagon in which the plaintiff was riding, carrying it some distance before the car was stopped. There was no physical impact upon his person, and no other physical injury was caused, aside from the consequences of the fright and mental shock which he suffered. But the court held there was sufficient actual injury to the person to sustain the suit, and that damages could be recovered for the injury produced by the fright. Where a woman was obliged to throw herself on a railroad platform to escape being struck by a piece of timber projecting from a car in motion, this was considered ample physical injury to warrant an action, and she was allowed to recover damages for the impairment of her health due to the fright occasioned by the accident: *Buchanan v. West Jersey R. R. Co.*, 52 N. J. L. 285.

A very frequent class of cases arises where a passenger on a railroad train is carried beyond his destination, and is put off at a place where the surrounding circumstances are likely to occasion fear and mental anxiety, or is compelled to walk back under similar circumstances. The question presents itself whether a recovery can be had for the injury resulting from fear produced by such a situation. In *Stutz v. Chicago etc. Ry. Co.*, 78 Wis. 147, 9 Am. St. Rep. 769, the plaintiff was put off the train in the night-time at a place several hundred feet from the platform of the depot of her

destination, at a place of danger of which the conductor had knowledge. She was thus compelled to walk along a sidetrack, in which there was an open culvert, into which she fell and was injured, and while endeavoring to extricate herself she was frightened by the backing of trains on the track toward her. The court held that the wrongful act of the defendant in directing the plaintiff to leave the train constituted a sufficient injury to sustain the action, and to allow a recovery for the fright and its consequences. The injury here which formed the basis of the action, said the court, was "not the fact that, after leaving the cars, the plaintiff fell into the cattle-guard, and was injured. That fact was only an aggravation of her damages she would have been entitled to recover had she received no personal injury." In *Missouri Pac. Ry. Co. v. Kaiser*, 82 Tex. 144, where two inexperienced girls, unaccustomed to traveling, were ejected from a train at a small railway station, where they were entire strangers, and contrary to provisions made for their safety by their parents, a recovery was allowed for the fright sustained by one of the girls by reason of her unlawful ejection. And in *Allen v. Texas etc. Ry. Co.* (Tex. Civ. App., Sept. 19, 1894), 27 S. W. Rep. 943, where the plaintiff, a girl of twelve, was put off of a moving train and forced to stand between the moving train and another train on an adjoining track, by reason of which she suffered great fright, she was allowed to recover for the physical injury in being put off the train and also for the fright occasioned thereby. The ground of recovery, where a passenger is put off a railway train at the wrong station and suffers fright through the negligence of the railroad employes, was said to be the contractual relation of the parties: *Texas etc. Ry. v. Gott*, 20 Tex. Civ. App. 335. If the wrong is a mere tort, and the fright is neither accompanied nor followed by physical injuries, no recovery can be had for the fright. But if there is a breach of a contract in connection with the shock and fright suffered, then a recovery may be had for the fright in an action on the contract. In this case the defendant was attempting to alight from the train at her destination, when the train started. She hung to the guardrail, one foot being on the step, the other dragging on the ground for a considerable distance, when with an effort she recovered her position on the train. Her dangerous position caused a severe shock and fright, for which she was held to be entitled to recover in an action for carrying her beyond her destination. *Houston v. McKensie* (Tex. Civ. App., June 5, 1897), 41 S. W. Rep. 831, is a similar case in which damages for fright followed by subsequent physical injury were given in an action for carrying a passenger beyond her destination. The authorities, however, are not in harmony on this point. And in *Deming v. Chicago etc. Ry. Co.*, 80 Mo. App. 152, where a passenger was carried beyond her destination, she was not allowed to recover for the fright and its consequent sickness caused by being put off the train at a strange point in the dark-

ness, where such fright was unconnected with a contemporaneous physical injury. To the same effect is an earlier Missouri case: *Trigg v. St. Louis etc. Ry. Co.*, 74 Mo. 147, 41 Am. Rep. 305. In *Atchison etc. R. R. Co. v. McGinnis*, 46 Kan. 109, where the only contemporaneous physical injuries consisted of a bruise and scratch on the ear, caused by the plaintiff's being thrown from her seat when a part of the railroad train ran off the track, a recovery for fright was not allowed.

In *Cases of Wanton or Intentional Wrong* the rule seems not to require a contemporaneous physical injury in order to sustain a recovery for fright and its consequences. In *Spade v. Lynn etc. R. R. Co.*, 168 Mass. 285, 60 Am. St. Rep. 393, where the court denied a recovery for bodily injury due to fright, it was intimated that the rule was probably otherwise where there was an intention to cause mental disturbance, or where the acts were done with gross carelessness or recklessness, showing an utter indifference to consequences. And this limitation on the rule seems to find recognition in the case of *Nelson v. Crawford* (Mich., Dec. 21, 1899), 81 N. W. Rep. 835. *Wilkinson v. Downton*, [1897] 2 Q. B. 57, seems to be the leading case on this point. Here the defendant, by way of a practical joke, represented to the plaintiff, a married woman, that her husband had met with a serious accident, whereby both his legs were broken. The statement was known to be false by the defendant, and he made it with the intent that it should be believed to be true. The plaintiff believed it to be true, and in consequence suffered a violent nervous shock which rendered her ill. The court held that an action would lie, that the shock and its resulting illness were the direct result of the defendant's wrongful act. *Barbee v. Reese*, 60 Miss. 906, is even more directly in point, since the shock here was fright pure and simple. The plaintiff, as appeared from the evidence, was a married woman, far advanced in pregnancy, and, while sitting at an open window of her home, the defendant approached. He was intoxicated and threatened to shoot her, and entered the house still continuing his threats and curses. The plaintiff was frightened and fled, and in her flight either jumped or fell from a fence which she had climbed. Three days later she suffered a miscarriage. The appellate court held that the woman was entitled to a recovery, and reversed a verdict for the defendant which had been rendered at the trial.

Recovery for Mere Fright Which Produces Injury is sanctioned in some jurisdictions, though not supported by the weight of authority. This is the doctrine of the principal case, and the reasons given by the courts which sustain the opposite rule are dismissed as being insufficient for denying a recovery in cases of this character. The case of *Bell v. Great Northern Ry. Co.*, 26 L. R. Ir. 428, is probably the most frequently cited of the cases which sustain an action to recover for mere fright and its consequences. The facts in this case showed that the plaintiff was a passenger on the de-

defendant's train. The train, it appears, was unable to go up a certain incline. She heard a rattling of chains and cries of "Jump out; you'll all be killed!" and the train started rapidly back. The train doors were locked and she saw people jumping out of the windows. She was greatly frightened, as a result of which she suffered severe illness. The usual objection was urged that the plaintiff had suffered no contemporaneous physical injury, and could not recover for the mere fright though there was consequent illness, since such damage was too remote. To this the court replied: "The distinction insisted upon is one of time only. The proposition is that, although, if an act of negligence produces such an effect upon particular structures of the body as at the moment to afford palpable evidence of physical injury, the relation of proximate cause and effect exists between such negligence and the injury, yet such negligence cannot in law exist in the case of a similar act producing upon the same structures an effect which, at a subsequent time—say a week, a fortnight, or a month—must result, without any intervening cause, in the same physical injury. As well might it be said that a death caused by poison is not to be attributed to the person who administered it because the mortal effect is not produced contemporaneously with its administration. . . . In conclusion, then, I am of the opinion that, as the relation between fright and injury to the nerve and brain structures of the body is a matter which depends entirely upon scientific and medical testimony, it is impossible for any court to lay down, as a matter of law, that if negligence cause fright, and such fright, in its turn, so affects such structures as to cause injury to health, such injury cannot be 'a consequence which, in the ordinary course of things, would flow from the' negligence, unless such injury 'accompany such negligence in point of time.'" This case was quoted from with approval in *Sloane v. Southern Cal. Ry. Co.*, 111 Cal. 668, and while the *Sloane* case did not involve a question of fright, the court said that it was immaterial what was the character of the mental excitement by which the injury to the body was produced, and announced this rule, that "if it can be established that the bodily harm is the direct result of the condition, without any intervening cause, it must be held that the act which caused the condition set in motion the agencies by which the injury was produced, and is the proximate cause of such injury." To what extent this rule would be followed in other cases arising in this state may be a matter of some doubt, but, unlike some other jurisdictions, it is not necessary, under section 3333 of the California Civil Code, that the injury should have been anticipated in order to entitle the one injured to a recovery therefor. That the injury must be one which the defendant could have reasonably anticipated has been one of the chief reasons for denying relief in cases of mere fright which results in injury. This reason is not applicable in California under the code provision. *Bell v. Great Northern Ry. Co.*, 28 L. R. Ir.

428, cites the unreported case of *Byrne v. Great Southern etc. Ry. Co.* in support of its decision. The plaintiff in this case was the superintendent of a telegraph office, his office being situated at the end of one of the defendant's sidings, between which and the office there was a permanent buffer. Through negligent switching a train entered this siding, broke down the buffer and the wall of the plaintiff's office. Plaintiff was not touched in his person, but he sustained a great fright and shock, which resulted in certain injuries to his health. An action to recover for the fright and its resulting injury was sustained, and the objection that there was no contemporaneous injury sufficient to sustain the action was held to be of no weight. The same doctrine was approved in *Purcell v. St. Paul City Ry. Co.*, 48 Minn. 134, where the passenger was a pregnant woman, who was placed, by the negligence of the carrier, in a position of such apparent imminent peril as to cause fright, and the fright caused a miscarriage, and it was held that the carrier's negligence was the proximate cause of the injury. The objection frequently urged that such a doctrine would require the adoption of a special rule for each particular case, depending on the sensitiveness of each individual injured, was met to some extent in this case by the court admitting that ordinarily a carrier owes no higher degree of care to a sick or sensitive person than to any other passenger, and that a carrier would not be liable for an injury caused by an act which was not negligent as to an ordinary passenger. "But when the act or omission is negligence as to any and all passengers, well or ill, anyone injured by the negligence must be entitled to recover to the full extent of the injury so caused, without regard to whether, owing to his previous condition of health, he is more or less liable to injury." *Fitzpatrick v. Great Western Ry. Co.*, 12 U. C. Q. B. 465, is frequently cited in support of the rule that there may be a recovery for mere fright and its consequences. The case does not, however, really support the rule. The decision was on a demurrer to the complaint, and the court, in overruling the demurrer, said that the complaint in alleging fright and sickness to a pregnant woman, due to a collision, sufficiently referred to the sickness as existing at the time of the collision, and being a contemporaneous injury a cause of action was stated, notwithstanding the injury was not an external bruise but an inward disorder.

It seems that in all the cases where a recovery has been allowed for fright which has resulted in bodily injury there must have been some wrongful act toward the injured party. Mere fright, though followed by serious consequences, will not sustain an action, unless the defendant has been guilty of an act wrongful as against the plaintiff. Thus, in *Slingerland v. East Jersey Water Co.*, 58 N. J. L. 411, the plaintiff, a girl of eighteen, was left in charge of her father's farm for a few hours. During this time a force of men made an entry on the farm to excavate a trench for a water pipe.

The part of the farm on which they entered had been condemned by proper legal proceedings for the public use of putting in a water pipe, and the men were rightfully there. The daughter, however, attempted to resist by force their entry, and as a result of the fright and nervous shock illness ensued impairing her health. The court denied a recovery on the ground that no wrongful act had been done against her; that in making such resistance she was the wrongdoer, and must bear the consequences to herself legally resulting therefrom. The courts have frequently gone far to find the wrongful act against the injured party. For example, in *Hill v. Kimball*, 76 Tex. 210, the plaintiff was a married woman, well advanced in pregnancy, and was a tenant on the defendant's land. The defendant knew her condition, and that any undue excitement was likely to cause serious injury to her health. Notwithstanding this, he came to the place, and in the yard, in the immediate presence of the wife, he assaulted two negroes in a boisterous and violent manner, which so frightened the wife as to eventually produce a miscarriage and otherwise impair her health. An action was sustained, the court saying that it was for the jury to determine whether such conduct was negligent toward the pregnant woman, and whether a reasonably prudent man would have anticipated the danger. *Yoakum v. Kroeger* (Tex. Civ. App., Oct. 10, 1894), 27 S. W. Rep. 953, is another close case. Here the cars of a railroad company were run off a switch into the plaintiff's yard, and within a few feet of her house, and though she was not actually touched she was so frightened as to cause great illness. An action was sustained. It appears that the defendant's cars had run off the track on four previous occasions and into the plaintiff's yard, and the defendant knew of this and had been requested to prevent a recurrence of the danger, but nothing was done until after the accident in question. If the decision is correct, it must be on the ground that the defendant had full knowledge of the danger to the plaintiff and that an accident was likely to occur, and a failure to take any steps to prevent it constituted negligence as against the plaintiff. The presence of these facts renders this case distinguishable from the similar case of *Ewing v. Pittsburgh etc. Ry. Co.*, 147 Pa. St. 40, 30 Am. St. Rep. 709, where the railway collision threw the defendant's cars upon the plaintiff's premises, causing great fright to her, which resulted in permanent impairment of health. In this case no recovery was allowed.

We have already noticed those cases where a passenger on a railroad train is carried beyond his destination and put off at some other point under circumstances likely to cause fright, and which do cause fright resulting in bodily injury. These cases in reality sustain the doctrine that a negligent act directed against a person, which results in fright and consequent illness, may form the basis of an action although no contemporaneous injury results. Thus, in *Stutz v. Chicago etc. Ry. Co.*, 73 Wis. 147, 9 Am. St. Rep. 769, it

was held that a passenger could recover for fright, in an action against a railroad company for damages caused by the wrongful act of the conductor in directing her to leave the train at a place of danger, where the conductor knew of the danger. The wrongful act here was the negligence of the conductor in directing the plaintiff to leave the cars at a place of known danger. In some other cases of the same character the basis of the action seems to be the breach of the contract of carriage: *Houston etc. R. R. Co. v. McKenzie* (Tex. Civ. App., June 5, 1897), 41 S. W. Rep. 831; *Missouri Pac. Ry. Co. v. Kaiser*, 82 Tex. 144. In either case, however, there is a wrongful act as against the plaintiff, and if fright followed by physical injury results, a recovery may be had. In *Illinois Cent. R. R. Co. v. Latimer*, 28 Ill. App. 552, affirmed in 128 Ill. 163, a child six years old was put off a train at a place other than a station and told to walk back to the station. The child suffered such a fright and shock as to permanently impair her health, and a recovery was allowed for this injury, though there was no contemporaneous physical injury. This case may seem to be in conflict with the other Illinois cases which deny a recovery for fright and its consequences in the absence of a contemporaneous injury. Here, however, the tender age of the child rendered the act of the conductor the proximate cause of the injury; the fright of the child and its consequences were such results as would naturally and reasonably follow the conductor's negligent act, and which he could reasonably anticipate as a result. Besides, the conductor acted with wanton disregard of the child's rights, and such conduct never requires contemporaneous injury. This case, therefore, is not an authority for the bald proposition that there can be a recovery for mere fright which is followed by physical injury, where the defendant has been guilty of some wrongful act toward the person injured.

Fear of Injury to Another is not such a consequence of the negligent act of a defendant as will form a basis for recovery. The only fear and mental anxiety for which a recovery is allowed is that which is endured by a person as a consequence of the injury to him and of the danger in which he is placed. Anxiety of mind about the safety of others who may be in danger of injury from the same cause cannot be considered: *Keyes v. Minneapolis etc. Ry. Co.*, 36 Minn. 290. The plaintiff is restricted to the mental anguish which emanates from the wrong done himself, and cannot be extended to that which he may experience in contemplating the suffering and danger of others: *Pullman etc. Co. v. Trimble*, 8 Tex. Civ. App. 335. So where a defendant was blasting rock near the plaintiff's house, and the plaintiff was not in a place of danger but her mother was, extreme fright and anxiety of the plaintiff about her mother at the time the blast went off and afterward, which fright resulted in a permanent injury to her health, cannot form the basis for a recovery: *Mahoney v. Dankwart*, 108 Iowa, 321. The court here said that

the plaintiff's fright and her subsequent condition were not caused by the blast, but were induced by her apprehension for her mother's safety.

To permit a recovery for mental anxiety respecting the safety of others would seem to be placing no limit whatever on the rule allowing a recovery for mental suffering. As was pointed out in *Hyatt v. Adams*, 16 Mich. 180, if a husband were allowed to sue for mental anguish on account of his wife's suffering, there was no reason why every other relative or even a neighbor should not be accorded the same right. "These considerations show the propriety and good sense of the rule which restricts the right of action for mental suffering to the person who has received the physical injury." There was no element of fright involved in this case, but the principle is the same. The fear and anxiety which an injured man experiences that he would leave his wife and children in a dependent and helpless condition cannot be considered in estimating the damages suffered by such injured person: *Atchison etc. R. R. Co. v. Chance*, 57 Kan. 40; *Texas etc. Ry. Co. v. Douglass*, 69 Tex. 694. Such fear and apprehension as to the future of one's family are not natural results of the injury, but depend upon the financial condition and social relations of the injured man.

An *Injury to Property* which causes fright and results in illness generally furnishes no ground for recovery, in the absence of a contemporaneous physical injury. Thus, in an action to recover damages for injury to real estate by blasting, the mental anxiety of the plaintiff for the personal safety of himself and his family is not a proper element of damages: *Wyman v. Leavitt*, 71 Me. 227, 36 Am. Rep. 308. *Fox v. Borkey*, 126 Pa. St. 164, is a similar case where blasting frightened the plaintiff, as a result of which her health became impaired. And where a defendant threw a stone through a window with the sole intent of injuring the house, not knowing that the plaintiff was in the room, and having no intention of frightening or of injuring her, it was held that she could not recover for the fright and the consequent injury to her health which she suffered: *White v. Sander*, 168 Mass. 206. Certainly, where the action is brought to recover for an injury to property, and the acts do not show either a willful or a negligent wrong as against the plaintiff, any fright or mental anxiety which she may suffer, though it results in physical illness, cannot be considered in estimating the damages: *Donahoo v. Scott* (Tex. Civ. App. March 12, 1895), 30 S. W. Rep. 385. But a forcible trespass may be accompanied by such aggravating circumstances as to justify a recovery for the fright and consequent illness which ensues. Thus, where thirteen men, one of whom carried a gun, unlawfully entered the plaintiff's property to dig a ditch, and the display of force was intended to intimidate the occupants, and the plaintiff's wife, who attempted to stop them, became sick from the fright and excitement caused by the treatment she received, evidence of the injuries

sustained by her was held to be admissible in a suit to recover for the forcible trespass: *Razzo v. Varni*, 81 Cal. 289.

In those jurisdictions where a contemporaneous personal injury is required to sustain a recovery for fright, it is clear that a mere injury to property is not such an injury as will authorize a recovery for the fright which may accompany the damage to the property in a suit for personal injuries. But where a concurrent personal injury is not required, it would seem that an injury to property which causes fright might be the foundation for a recovery for such fright and its consequences, if the acts were negligent or willful as against the one so suffering. Thus, we have already seen that where the defendant's cars had run off the track onto the plaintiff's property, and the only injury at the time was to property, the plaintiff, in an action for personal injuries, was allowed to recover for her fright and subsequent illness, the acts of the defendant being negligent as to her: *Yoakum v. Kroeger* (Tex. Civ. App., Oct. 10, 1894), 27 S. W. Rep. 953.

ANDERSON v. SESSIONS.

[93 Texas, 279.]

HOMESTEAD—GARDEN NOT CONNECTED WITH THE RESIDENCE LOT.—A lot which is used for the purpose of raising vegetables, berries, and fruits for the consumption of the family is a part of the residence homestead, although it is not connected with or appurtenant to the residence lot but is situated in a distant part of the city.

F. M. Brantley, for the appellant.

Graham & Turner, for the appellees.

²⁷⁹ The majority and dissenting opinions of the court of civil appeals, sent up with the certificate of dissent herein, were as follows:

MAJORITY OPINION.

"HUNTER, A. J. This was a suit instituted in the district court of Montague county on the twenty-eighth day of June, 1898, by appellee against W. R. Pierson, constable of precinct No. 4, Montague ²⁸⁰ county, and A. J. Anderson, appellant, to enjoin the sale by said constable of a tract of land situated in the town of Bowie, in said Montague county, under an execution issued out of the justice's court of precinct No. 1, Tarrant county, upon a judgment rendered therein in favor of A. J. Anderson against S. A. Sessions. The ground on which the sale was sought to be enjoined was that the property, consisting of about two acres, constituted part of the

residence homestead of appellee and his family, and as such was exempt from such sale; that while it was detached from the dwelling of appellee, yet by reason of its cultivation, use, etc., it constituted part of the residence homestead of appellee.

"Appellant Anderson and the constable answered by general demurrer and special exception, admitting the existence of the judgment in the justice's court mentioned, as well as the issuance and levy of the execution mentioned therefrom on the property in question, but denying that the property levied upon was exempt or constituted any part of the homestead of appellee or his family. They further averred that appellee acquired the property in question simply for purposes of speculation, and so held the same at the time of the levy in question, and not for the purpose of a homestead at all, and that the claim of appellee that the same constituted any part of his homestead was a mere pretense, a fraud, and a sham, sought to be asserted with the fraudulent intent of preventing the just seizure and subjecting of the property toward the satisfaction of his just debts.

"The case was tried by the court without a jury, and judgment was rendered perpetuating the injunction, the court below finding that the lot in question was part of the residence homestead of appellee; and from this judgment this appeal is taken.

[The facts found by the district judge are stated in the opinion of Chief Justice Gaines.]

281 "To this we add another point from the statement of facts—that the appellee's business or occupation was that of a drummer or traveling salesman, and had been for eight years previous to the levy, and the lot in question was not claimed as his business homestead, but as part of his residence homestead, and that the two lots were situated in different parts of the city altogether, the one in controversy having been acquired several years after the establishment of his home on the other.

"Upon the facts found by him the learned district judge filed the following conclusion of law: 'From the foregoing findings of fact I conclude, as a matter of law, that the premises in controversy at the time of the levy of said execution thereon constituted a part of the homestead of plaintiff and his family, being used for the purposes of a home, and hence that the same was exempt from such levy.'

"The contention of appellant is: 1. That the lot was not being used for the purposes of a home; that the products thereof,

ough used only by the family for their maintenance and ease, were not necessary to the use of the mansion or home, a home, nor did they or the lot contribute to the proper use or enjoyment of such mansion or home, though they may have contributed to the support of the family; and 2. That the lot was not connected with or appurtenant to the residence, but was about half a mile distant therefrom; that its use was in no way essential to the proper occupancy, use, or enjoyment of the home by appellee or his family.

"We cannot agree with appellant in his contentions. Our constitution provides: 'The homestead in a city, town, or village shall consist of lot or lots, not to exceed in value five thousand dollars at the time of their designation as the homestead, without reference to the value of any improvements thereon; provided that the same shall be used for the purposes of a home or as a place to exercise the calling or business of the head of the family': Const. 1876, art. 16, sec. 51.

"This provision does not require that the lots shall be connected with each other, or even that they shall be near to each other, but only that they must be within the city, town, or village limits. Nor does it require ²⁸² that they should be necessary or essential to the occupancy, use, or enjoyment of the mansion house, but only that they be used for the purposes of a home.

"The case of *Iken v. Olenick*, 42 Tex. 196, is relied on by appellant to show that the lot must be contiguous to the residence lot. But that decision was rendered in 1875, under the constitution of 1869, which contained no such provision relating to the use of the lots for the purposes of a home as is contained in our present constitution of 1876. The constitution under which that decision was rendered provided for the exemption from forced sale as the homestead of 'any city, town, or village lot or lots not to exceed five thousand dollars in value,' but that decision was made to turn on Worcester's definition of the word 'homestead'—'The place of the house; mansion house with the adjoining land'; and following this definition our supreme court as then constituted overruled a line of decisions running back for nearly twenty years which were more liberal to the family, as they allowed as part of the homestead the lot upon which the husband carried on his business to support his family, as well as all others occupied by the family, not exceeding two thousand dollars in value, al-

though disconnected and remote from the residence lot: *Pryor v. Stone*, 19 Tex. 373, 70 Am. Dec. 341.

"In the case last cited, Chief Justice Hemphill, construing our constitution of 1845, which exempted 'any town or city lot or lots, in value not to exceed two thousand dollars,' said: 'It allows any number of lots, not to exceed two thousand dollars, and it cannot be material how many or how far or how near or remote from each other may be the lots occupied for the convenience of the family and for the prosecution of the business or employment of its head or members.'

"Thus the people of Texas understood their homestead law for two decades, and seem to have been contented and happy, when the decision in *Iken v. Olenick*, 42 Tex. 196, suddenly made its appearance in their reports, and in less than twelve months from the rendition thereof a convention of delegates from the people were met in Austin and had framed the present constitution, in which, in our opinion, they in unmistakable terms framed a homestead law exactly in accord with Chief Justice Hemphill's decision, overruling, as it were, the decision in *Iken v. Olenick*, 42 Tex. 196, and confirming that in *Pryor v. Stone*, 19 Tex. 373, 70 Am. Dec. 341. So that now, whatever may have been Mr. Worcester's definition of the word 'homestead,' the people of Texas have made a definition of their own and have declared that the homestead in a city, town, or village shall consist of lot or lots, in whatever portion of the town situated, whether near to each other or remote, not to exceed in value five thousand dollars, provided they be used either for the purposes of a home or as a place to exercise the calling or business of the head of a family.

"Following the adoption of that constitution came in 1881 the decision in *Arto v. Maydole*, 54 Tex. 247, where our supreme court, in construing the clause defining an urban homestead, said: 'The question is not whether any portion of this adjoining block may have been ²⁸³ a necessity or a mere convenience to the enjoyment of the homestead, but whether in fact it was a part of the homestead. If it was, the fact that it may have been used as an approach to the mansion or for the purpose of ornamentation or pleasure grounds only would not defeat it of the homestead protection.'

"In 1882 the case of *Brooks v. Chatham*, 57 Tex. 33, was decided, where the clause of the constitution defining the rural homestead was construed. That clause provides that the country homestead 'shall consist of not more than two hundred

acres of land, which may be in one or more parcels, with the improvements thereon,' and the court held that the clause immediately following the definition of an urban homestead, to wit, 'provided the same shall be used for the purposes of a home,' applied to the parcels of land claimed as a rural homestead the same as it did to the lot or lots claimed as a city homestead; and it was further said by the distinguished jurist who wrote that opinion that the parcel claimed might be situated eight or ten miles from the home place, if its use was such as to designate it as part of the home.

"In 1883 the same court held in *Medlenka v. Downing*, 59 Tex. 40, that the use of a town or city lot for a garden 'fixed upon it the homestead character'; and this, too, in a case where the lot was separated by a fence and the homestead had been designated in writing for the purpose of securing a loan, excluding the garden, upon which, with other property, the mortgage was given.

"In 1884 the same court, in the case of *Jacobs v. Hawkins*, 63 Tex. 4, said: 'If there be an actual use of property as for a homestead purpose, although it be detached from the lot on which the residence or mansion house stands, then it is not necessary that some open assertion or claim to it as part of the homestead be made, otherwise than as such claim is evidenced by the use.'

"Following this decision, in the year 1885, the case of *Axer v. Bassett*, 63 Tex. 548, was decided, where the two-acre lot claimed as part of the urban homestead was one hundred yards from the residence lot, but was used for a rye and barley patch and to pasture cows and horses on, and it was held to be part of the homestead because used for the purposes of the home.

"We think that the use of a lot for the purpose of raising garden vegetables, berries, and fruits for the family table is one of the uses to which home lots are usually devoted. It is a garden, as the term is understood among Texans, and a garden in a Texas town or village is considered as much a part of the home as the front yard or the back yard or the stables and horse lot, and the writers of our constitution must have so understood it and intended it: *Waggener v. Haskell*, 89 Tex. 435. If the lot adjoined the residence lot, used as it is, though divided from it by a high wall or fence, would anyone contend that it was not a part of the homestead? Certainly not. And why would it be? Simply because it was used for the purposes of a home, and not because it was contiguous.

284 "Then if a garden is a home use, one that would protect it if adjoining the residence lot, as held in *Medlenka v. Downing*, 59 Tex. 40, we can see no reason why the same use will not protect it though situated across the street, as in *Jacobs v. Hawkins*, 63 Tex. 4, or across ten streets, or anywhere else in the town, city, or village. It might not be as convenient a homestead, thus scattered from suburb to suburb, but probably the best the poor drummer would be able to own. He might not be able to own the lot adjoining his residence to use for a garden, because of its great value for building purposes, but could buy one in the suburbs of the town larger and perhaps better adapted for a garden, and thus add a few comforts to his home. If play grounds and shady parks with graveled walks used only for pleasure or ornamentation are protected, because used for the purposes of a home, we think that a little garden spot, although in a distant suburb of the town, would not be an improper or an unreasonable addition to the homestead, where it is used for the purpose of supplying the home table with the necessities and comforts of life; for the children of the poor must eat, though they may not have much time to play.

"It is contended also that because when he bought the lot he intended to build a residence on it when he got able, and has since only used it as a garden, this would render it liable to execution. But we are also constrained to differ from this view. Both are homestead purposes, and shifting the uses of the lot from one homestead purpose to another does not constitute an abandonment nor deprive the lot of its homestead character: See *Axer v. Bassett*, 63 Tex. 548.

"Finding no error in the judgment, it is affirmed."

DISSENTING OPINION.

"STEPHENS, A. J. It is not pretended that the lot in controversy, consisting of about two acres and used as a garden for appellee's family, was exempt as a place to exercise his calling or business, which was 'that of a traveling man,' but the exemption is claimed upon the sole ground that the same was 'used for purposes of a home.'

"The case made by the undisputed evidence is this: About eight years before the trial appellee acquired a homestead in the southeastern part of the town of Bowie, upon a lot seventy by one hundred and forty feet, where he has ever since resided with his family, the improvements on this lot consisting of a

dwelling-house, barn, cow lot, etc. About five years later he purchased the two-acre lot in controversy in the northern part of the town and distant a half mile or more from his residence, with the intention of building and moving on it 'when he got able to do so,' or when he could sell the place where he lived in the southeast part of the town. With this in view he had it fenced and planted with fruit trees, grape vines, and blackberries. He also caused it to be cultivated in vegetables of various kinds each year thereafter, which were used by his ²⁸⁵ family 'in home consumption.' Both lots are situated within the corporate limits of Bowie, a town of three thousand five hundred or four thousand people, but in different parts of the town altogether. 'The territory intervening is cut up into streets and lots and blocks, and is pretty well built up with residences and settled up.'

"The constitution of this state exempts the homestead of the family from execution, and provides that an urban homestead 'shall consist of a lot or lots not to exceed in value five thousand dollars at the time of their designation as a homestead, without reference to the value of any improvements thereon, provided that the same shall be used for the purposes of a home, or as a place to exercise the calling or business of the head of a family.'

"In *Waggener v. Haskell*, 89 Tex. 435, it was held that this constitutional definition of the homestead was intended to settle the previous conflict of judicial construction upon that question, it having first been decided, as expressed in the opinion of Chief Justice Hemphill in *Pryor v. Stone*, 19 Tex. 371, 70 Am. Dec. 341, that the homestead might include, besides the place of residence, 'a place where the head or members may pursue such business or avocation as may be necessary for the support and comfort of the family,' though remote from the place of residence; but in the opinion of Justice Moore in *Iken v. Olenick*, 42 Tex. 195, the exemption beyond the 'mansion house' was restricted to 'the land which, from its use, as well as its contiguity, it is to be supposed was intended to be exempted from the demands of creditors, as part and parcel of the land connected with and necessary for the use and enjoyment of the mansion house,' thus excluding the place of business, if not otherwise a part of the homestead.

"In this connection it may not be amiss to quote from *Thompson on Homesteads and Exemptions*, section 120, page 105, the following characteristic comment: 'We shall also see that

the doctrine of the early Texas cases—that a man can have a homestead scattered all over a town, regardless of intervening streets, alleys, lots, or blocks—has been exploded in that state, denied in Kansas, and cannot be regarded as sound law anywhere.’

“Says Justice Denman in *Waggener v. Haskell*, 89 Tex. 435, referring to the above quotation from the constitution: ‘It will be observed that the first proviso includes: 1. Land used for the purposes of a home, as indicated in the opinion of Justice Moore; and 2. Land used as a place to exercise the calling or business of the head of a family, as contended by Chief Justice Hemphill.’

“The plain meaning of the constitutional definition then is, that the lot or lots claimed to be exempt must, first of all, be designated as the homestead, either residence or business or both, and if, as in this case, only a residence homestead is claimed, the definition given by Judge Moore, and not that of Chief Justice Hemphill, should apply. It therefore seems to me that the lot in question, besides being acquired and designated for a different purpose, was not so situated and used ~~as~~ in connection with the ‘mansion house’ as to make it ‘appendant to and part thereof,’ it being entirely too remote from the residence for ‘it to be supposed’ that it ‘was intended to be exempted from the demands of creditors, as part and parcel of the land connected with and necessary for the use and enjoyment of the mansion house.’ It cannot fairly be said in such case to have been used for the purposes of a home, however beneficial its use may have been to the family, and whatever might be the effect of such use were the lot in the vicinity of the ‘mansion house,’ so as to be appurtenant thereto.

“In my opinion, the separated lots in a town or city exempted by the constitution as the place and for the purposes of the home should be situated at least approximately together, and not, as in this instance, a half mile apart and on opposite sides of the town—in totally different neighborhoods. It was this anomalous idea of a home ‘scattered far and wide’ which our supreme court repudiated in *Iken v. Olenick*, 42 Tex. 195, the governing principle being thus further stated in that case: ‘The visible occupation of the homestead, or mansion house, or lands adjoining or in actual use, as appendant to and part thereof, is notice to creditors and purchasers dealing with the husband.’

"The correctness of that decision has never since been questioned, as it is undoubtedly sound and in line with the authorities everywhere, but the latest expression of our supreme court is to the effect that it has received constitutional sanction, though the constitution went further and exempted, in addition, as the place of business what was held not to be exempt in *Iken v. Olenick*, 42 Tex. 195, as a part of the home premises: *Waggener v. Haskell*, 89 Tex. 435; *Thompson on Homesteads and Exemptions*, sec. 127.

"What was said by Judge Stayton in *Brooks v. Chatham*, 57 Tex. 31, was with reference to a rural homestead, and it will be observed that the proviso above quoted from section 51, article 16, of the constitution applies as well to the parcels of land in the country as to the lots of land in a town or city; that is, one or more parcels of the land constituting the homestead in the country, if not used for the purposes of a home, may still be exempt as the place to exercise the calling of the head of the family, that of farming and the like. Hence it is immaterial that such parcel or parcels may be remote from that upon which is situated the dwelling-house and home of the family. The homesteader still gets the substantial benefit, it is true, of the doctrine of the early Texas cases which was repudiated in *Iken v. Olenick*; 42 Tex. 195, but it is under the constitutional provision exempting the place to exercise the calling or business of the head of the family, and not that exempting what is designated and used merely for the purposes of a home.

"As the business of a 'traveling man' or 'drummer' is of such nature as not to admit of a place for its exercise, he is without the pale of the provision exempting a place of business. His homestead exemption is not broader, therefore, than that covered by the definition in *Iken v. Olenick*, 42 Tex. 195, for he can only have what for the sake of convenience is termed ²⁸⁷ the residence homestead. Nor does the law allow him two such homesteads, though in reality that seems to be what is claimed in this case; for the effect of the findings of fact, in my opinion, is that the lot in question, situated in the northern part of Bowie, was acquired and improved, not as a part of the existing homestead in the southeast part of the town, but to become a new and different homestead at an indefinite time in future, it being used in the meantime for just such purposes as a farm, orchard, or garden in the country would be used. That is, it was never designated by concurrent intention

and use as a part of the already established homestead, but the use made of it in connection therewith was temporary merely.

"Upon both of these grounds I am constrained to dissent from the conclusion of the majority, and that, too, notwithstanding the pathetic appeal made in their opinion in behalf of the 'poor drummer.' 'The children of the poor must eat,' say they, to which, without dissenting from a proposition so humane and benevolent, I answer, let them be fed by him who is responsible for their existence in the world, and upon whom, therefore, naturally and justly devolves the duty, rather than by judicial construction at the expense of the creditor, who may, perchance, be also poor, with children of his own to feed. If he is not equal to the task, and the 'poor man's burden' must be borne by strangers, then open wide the door of charity and let others besides the creditor in. But until the law provides for the 'poor drummer' some exemption in lieu of a place to exercise the business or calling of the head of the family, it is not within the province of the courts to make any such provision merely because his children 'must eat.'"

GAINES, C. J. This case comes to us upon a certificate of dissent.

The suit was brought by the appellee against one Pierson, as constable, and the appellant, as plaintiff in execution, to enjoin the sale of a certain lot in the town of Bowie, upon the ground that it was a part of his homestead and therefore exempt from forced sale.

The case was tried without a jury and the trial judge found the following facts: "As to matters of fact, I find that the defendant Anderson, in the justice's court of Tarrant county, recovered judgment against the plaintiff, and that the execution sought to be enjoined was issued upon said judgment and levied upon the premises in controversy as the property of plaintiff, as alleged in the plaintiff's petition.

"I also find that plaintiff is, and was at the time of such levy, a married man, the head of a family consisting of himself, his wife, and three children; that with his family he has continuously resided in Bowie, Montague county, Texas, on lot 8, block 48, of Stalling's addition to Bowie, which is seventy by one hundred and forty feet, owned by him for many years last past. The premises in controversy are also situated within the corporate limits of said city of Bowie, from eight hundred to one thousand yards from the lot on which ²⁸⁸ plaintiff resides.

He purchased the premises in controversy in January, 1895, intending, when he got able to do so, to build upon it and move onto it with his family, and very soon after his purchase inclosed the same with a fence and planted a portion thereof in fruit trees, and grape and blackberry vines, and the next season planted the greater portion of the remainder in such trees and vines. That during the year 1895 and for each year since, including the present year, he has cultivated said premises in garden vegetables exclusively for the use of himself and his family, carrying the vegetables and fruits raised thereon to the place of his residence to be eaten by his family. He has never sold any of the products raised on such premises, and no part of said premises has been used, since plaintiff purchased the same, for raising products for market, but solely for the table use of plaintiff and family, and no part of said premises has been rented out to any person. That since acquiring said premises plaintiff has not used any other piece of ground as a garden, and on said lot 8, where he resides, he has no garden and no room for any.

"The premises in controversy consist of about two acres of ground, worth about one hundred and fifty dollars, and these premises together with said lot 8, on which plaintiff resides, are worth, and have always been worth, less than five thousand dollars."

Upon the facts so found the court held the lot in controversy exempt and gave judgment for the plaintiff.

The court of civil appeals adopted the findings of the court below and affirmed its judgment, one of the judges dissenting. The question whether, under the constitution and laws of our state, the lot in controversy is to be deemed a part of appellee's homestead and therefore not subject to be sold under execution, is ably and exhaustively discussed both in the opinion of the court and in that of the dissenting judge. We therefore deem it sufficient to say that we concur in the view of the majority, and are of opinion that the point of dissent was correctly decided by the court. Accordingly, our opinion will be so certified.

Affirmed.

HOMESTEAD.—A LOT MAY BE INCLUDED in a declaration of homestead when it adjoins the lot on which the dwelling of the claimant stands, and is used for a garden by his family, and has thereon a well also used by them: *Arendt v. Mace*, 76 Cal. 315, 9 Am. St. Rep. 207. A homestead includes whatever lands or appurtenances are connected with the home and are convenient for its

enjoyment: Monographic note to *Pryor v. Stone*, 70 Am. Dec. 350, on what may be exempt as a homestead. See, also, *Brandies v. Perry*, 89 Fla. 172, 68 Am. St. Rep. 164; *Hodges v. Winston*, 95 Ala. 514, 26 Am. St. Rep. 241.

SAN ANTONIO AND ARKANSAS PASS RAILWAY COMPANY v. SOUTHWESTERN TELEGRAPH AND TELEPHONE COMPANY.

[96 Texas, 313.]

TELEGRAPH AND TELEPHONE COMPANIES—EMINENT DOMAIN.—A statute which confers upon telegraph companies the right of eminent domain in condemnation proceedings applies to telephone companies, and authorizes a like procedure by telephone companies.

TELEGRAPH AND TELEPHONE COMPANIES—TELEGRAPH INCLUDES TELEPHONE.—The phrases "magnetic telegraph lines" and "any telegraph lines," found in a statute, are broad enough to include the "telephone," which is merely another method of communication by means of electricity.

TELEGRAPH AND TELEPHONE COMPANIES—TELEGRAPH INCLUDES TELEPHONE—CHANGE IN STATUTE.—Although at the time a statute was passed relating to the "telegraph" the "telephone" was not in the contemplation of the legislature, because of its not being generally known, a subsequent act authorizing the creation of a corporation "for the construction and maintenance of a telegraph and telephone line" is a recognition of their substantial identity as a method of communication by means of electricity.

STATUTES—CHANGE IN LANGUAGE.—An amendment to a statute showing a change in language in a material respect indicates an intent to change the meaning of the law.

FOREIGN CORPORATIONS—EMINENT DOMAIN.—A statute which confers on foreign corporations obtaining permits to do business in the state all the privileges enjoyed by domestic corporations, includes the right of eminent domain in condemnation proceedings.

Baker & Ross and Robson & Duncan, for the appellant.

McLaurin & Wozencraft, for the appellee.

³¹⁷ BROWN, A. J. The court of civil appeals for the third supreme judicial district has certified to this court the following statement and questions:

"The appellee is authorized to do business in Texas as a telegraph and telephone company, and is putting in operation a long distance telephone system to and from different towns in the state of Texas. The appellee brought this action to have

condemned certain portions of the right of way adjoining the appellant's railway line, for the purpose of planting and erecting its telephone poles, upon which, it appears, from the evidence, they propose to place telephone wires for the purpose of operating a long distance telephone system. Electricity is an agent used in the operation of both long distance telephone and electric telegraph lines.

"In connection with the above facts, we certify to the supreme court for its answer the following questions: ³¹⁸ 1. Do the statutes that relate to the exercise of the right of eminent domain in condemnation proceedings conferred upon telegraph companies apply to telephone companies and authorize a like procedure by telephone companies? 2. If the above question is answered in the negative, then did the appellee have the right to institute and maintain the condemnation proceedings in question, by reason of the fact that it was also authorized to construct telegraph lines, as well as telephone lines; and in this connection it is well to state that we find that the line sought to be established and erected upon the appellant's right of way by the appellee was to be used as a long distance telephone line."

To the first question we answer, yes.

The following articles of the Revised Statutes were enacted by the legislature in the year 1871:

"Article 698. Corporations created for the purpose of constructing and maintaining magnetic telegraph lines are authorized to set their poles, piers, abutments, wires, and other fixtures along, upon, and across any of the public roads, streets, and waters of this state, in such manner as not to incommode the public in the use of such road, streets, and waters.

"Article 699. Such companies are also authorized to enter upon any lands, whether owned by private persons in fee or in any less estate, or by any corporation, whether acquired by purchase or by virtue of any provision in the charter of such corporation, for the purpose of making preliminary surveys and examinations with a view to the erection of any telegraph lines, and from time to time to appropriate so much of said lands as may be necessary to erect such poles, piers, abutments, wires, and other necessary fixtures for a magnetic telegraph, and to make such changes of location of any part of said lines as may, from time to time, be deemed necessary, and shall have a right of access to construct said line, and when erected, from time to time, as may be required, to repair the same, and may proceed

to obtain the right of way and to condemn lands for the use of the corporation in the manner provided by law in the case of railway corporations."

At that time telephones had been recently invented, and were not generally known, and it cannot be supposed that the legislature had telephones in mind when it used the word "telegraph"; however, the fact that the telephone was not then in contemplation of the legislature does not control the construction of article 641, subdivision 8, for, if the language used is broad enough to embrace a subsequently developed method, the later invention might be controlled by the pre-existing law as if it had been in existence at the time the law was made: *Attorney General v. Edison Tel. Co.*, L. R. 6 Q. B. 254, 255.

The term "telegraph" has been held in the following cases to include telephones: *Franklin v. Northwestern Tel. Co.*, 69 Iowa, 97; *Iowa etc. Tel. Co. v. Board of Equalization*, 67 Iowa, 250; *Wisconsin Tel. Co.* ³¹⁹ *v. Oshkosh*, 62 Wis. 32; *State v. Central etc. Tel. Co.*, 53 N. J. L. 341; *Attorney General v. Edison Tel. Co.*, L. R. 6 Q. B. 244; *Northwestern Tel. Exch. Co. v. Chicago etc. Ry. Co.*, 76 Minn. 334. Each of the cases hold that the word "telegraph," when used in a statute, includes the telephone, but the two cases of *Attorney General v. Edison Tel. Co.*, L. R. 6 Q. B. 244, and *State v. Central etc. Tel. Co.*, 53 N. J. L. 341, are the most directly in point.

The former case was based upon this state of facts: In England there were statutes providing that "the postmaster general is to have the exclusive privilege of transmitting messages or other communications by any wire and apparatus connected therewith used for telegraphic communication, or by any other apparatus for transmitting messages or other communications by means of electrical signals": *Attorney General v. Edison Tel. Co.*, L. R. 6 Q. B. 244, cited above. In that case the court said: "The result of the definition seems to be that any apparatus for transmitting messages by electric signals is a telegraph, whether a wire is used or not, and that any apparatus of which a wire used for telegraphic communication is an essential part is a telegraph, whether communication is made by electricity or not." The telephone company was organized to operate a telephone system in the city of London, and, under the law previously cited, the attorney general brought an action claiming that it was in violation of the statute of that kingdom, and the question turned upon whether or not the telephone was within the meaning of the act in relation to the telegraph. The court

held the telephone to be embraced in the law. That case was very similar in its nature to this; the government was exercising its sovereign power in controlling and appropriating to itself the property of the citizen—the telephone—or, at least, the use of it, as is done in the case of eminent domain, where the right of way is taken for the use of the government or by its authority for public use by a corporation or natural person. The same rules of construction, therefore, we think would apply in this case as in that. Upon a very elaborate discussion and philosophical examination of the question, the court held that the term “telegraph” was “wide” enough to include the telephone, and the government was entitled to control its operation within that kingdom.

In *State v. Central etc. Tel. Co.*, 53 N. J. L. 841, before cited, the telephone company was organized under the general law of the state of New Jersey, which authorized the organization of telegraph companies but did not specifically authorize the organization of telephone companies. The company undertook to construct its line and to condemn the right of way therefor. The question arose as to the validity of its incorporation and its right to condemn property. The court in that case held that the term “telegraph,” as used in the statute, included “telephone,” and that the charter granted to a telephone company, under the general law, authorizing the incorporation of telegraph companies was valid. A statute of that state making the laws regarding “telegraphs” ³²⁰ applicable to “telephones” was invoked, but its validity being questioned, the court disregarded it, and put the decision squarely upon the provisions of the law concerning “telegraph” companies.

Counsel for appellant claim that the supreme court of the United States decided in the case of *Richmond v. Southern Bell Tel. Co.*, 174 U. S. 761, that “telephone” was not embraced in the word “telegraph,” and that a telephone company was not entitled to the privileges granted by the act of Congress of 1866, which granted certain privileges to telegraph companies. It is true the court so held, but it was not upon the construction of the words “telegraph” and “telephone,” but upon the conclusion reached that, under the then existing circumstances, Congress did not have in mind the telephone when it enacted the law granting the privilege to telegraph companies, for the reason that at the time the act was passed telephones were not known to the members of the national legislature. The opinion of the court is, however, pregnant with the thought that

if the telephone had then been in common use, the decision might have been different. However that may be, we do not consider that case applicable here.

Upon good authority and sound reasoning, we can safely say that the phrases "magnetic telegraph lines" and "any telegraph lines," found in articles 698 and 699 of the Revised Statutes, are broad enough to include the "telephone" if the legislature so intended in the enactment of the statute now in force, authorizing the creation of "telegraph and telephone" corporations. Inquiry is not directed to the intent of the legislature when articles 698 and 699 were first enacted, but we seek the legislative intent in the year 1891, when the law concerning private corporations was amended by the present provision.

A brief history of legislation upon this subject will aid us in construing the statute now in force. Articles 698 and 699, which grant to telegraph companies the right to condemn right of way for erecting their lines, etc., were enacted as sections 53 and 54 of the general incorporation law first passed at the session of 1871, and afterward re-enacted in the year 1874. The fifth subdivision of section 566 of the original act provided that a corporation might be formed for "the construction and maintenance of a telegraph line," no mention being made of the telephone. Articles 698 and 699 have remained in force since their enactment as parts of the general incorporation law, and the provision for incorporating a telegraph company, before quoted, continued until the year 1885, when it was amended so as to read, "the construction and maintenance of a telegraph or a telephone line," in which form it continued until the year 1891. It will be observed that in the act last quoted "telegraph" and "telephone" are not only used disjunctively, but the article "a" is so placed before each as to show distinctly the intent to separate them and to authorize the construction of one or the other—not both. In the year 1891 the legislature amended article 566 of the Revised Statutes, and in the eighth subdivision authorized ³²¹ the creation of a corporation for "the construction and maintenance of a telegraph and telephone line," which is the law in force at this time.

The change in the form of expression is so marked as to indicate with certainty a change in the policy of the legislature with reference to telegraph and telephone lines. A change of language in a material respect is held to show an intent to change the meaning of the law: *James v. Patten*, 6 N. Y. 9, 55 Am. Dec. 376; *Lehman v. Robinson*, 59 Ala. 240; *Rich v.*

Keyser, 54 Pa. St. 89. Between the enactment of the first statute upon the subject and the one last cited a period of twenty years elapsed, during which time great progress was made in scientific development in both telegraphing and telephoning. During this period of time many of the courts of the land determined, in accordance with scientific opinion on the subject, that the word "telegraph" is a comprehensive term which includes the telephone system. We can see in the changes of the law what progress had been made in the public mind as reflected in these various statutes. At first, the telephone was not mentioned; then the expression was such as to show that the relation between the telegraph and the telephone was not appreciated, perhaps not comprehended at that time by the legislators, and finally that body gave expression to the conclusion reached by the courts that the broader term, "telegraph," includes "telephone," as a method of communication by means of electricity, and in order to facilitate the construction and use of these aids—we might say necessities—to the business and convenience of the public, the law was so changed that "a telegraph and telephone line" might be constructed and operated, using the one or the other, or both, under the same charter provisions.

The change in the law of 1885 by the amendment of 1891 consists in substituting the copulative conjunction "and" for the disjunctive "or" and in omitting the article "a" after the conjunction; by this change of the sentence the meaning of the law is manifestly changed, so that the words "telegraph" and "telephone," as adjectives, are applied to the one object "line." The structure of this sentence indicates that the legislature understood that "telegraph" and "telephone" were closely related in meaning, and, in fact, so consistent with each other that the two words were used to express different modes of accomplishing the one purpose—the transmission of messages by means of electricity.

As the law now stands, it must be construed either to authorize and require of the incorporated company to construct both a telegraph and a telephone system upon one line, or that they are expressions of different methods of carrying out the common purpose of telegraphing; that is, that the telegraph includes the telephone system. If we place the former construction upon the sentence, holding that "a telegraph" and "a telephone" are different, when a company organized to construct "a telegraph and telephone line" shall undertake to secure

right of way, ³²³ it can condemn for the use of telegraphic purposes alone, and being bound, if it erects a telegraph line, to also construct a telephone, the corporation would be without power to use the right of way for the telephone line, because under that construction the authority to condemn would be restricted to the "telegraph," and the erection of the telephone upon right of way condemned for a telegraph line would be an additional burden not authorized by law, and the corporation would be without power to acquire right of way for a telephone, without which it could not conduct its business. This would be an absurd consequence, which shows the construction not to be legitimate. The interpretation which confers upon telephone corporations the rights granted to telegraph corporations harmonizes every provision of the law upon the subject of telegraph and telephone, and is consistent with the well-known history of the times in which these statutory provisions were evolved.

We conclude that, when the legislature of 1891 enacted the law in its present form, it intended to express that "telephone" was within the broad meaning of "telegraph," and that corporations formed under subdivision 8 of article 641 of the Revised Statutes are "created for the purpose of constructing and maintaining magnetic telegraph lines," and are authorized by article 699 to condemn right of way for their lines.

Article 745 of the Revised Statutes requires foreign corporations to procure permits to do business in this state, prescribing what they must do to procure the permits, and with reference to such as may comply enacts: "Such corporations, on obtaining such permits, shall have and enjoy all of the privileges conferred by the laws of this state on corporations organized under the laws of this state." Thus the state adopts the foreign corporation upon the terms stated in the law and makes it equal to domestic corporations. Language could not be more comprehensive, and is ample to embrace the right of condemnation. It would be a mockery to give the corporation permission to construct and maintain "a telegraph and telephone line" and at the same time deny to it the use of the only means by which it could exercise the privilege granted.

TELEGRAPH INCLUDES TELEPHONE, as the word is used in statutes and in condemnation proceedings: See the monographic note to Central Union Tel. Co. v. Falley, 10 Am. St. Rep. 128-130, on the law of the telephone.

EMINENT DOMAIN.—A FOREIGN CORPORATION may be authorized by the legislature to acquire property by condemnation:

New York etc. R. R. Co. v. Welsh, 143 N. Y. 411, 42 Am. St. Rep. 34; and a statute concerning the power of railroad companies to take land under eminent domain applies to all corporations operating roads within the state, whether domestic or foreign: Myers v. McGavock, 89 Neb. 843, 42 Am. St. Rep. 627.

VICKERY v. CRAWFORD.

[93 Texas, 378.]

SEQUESTRATION—WRIT OF—SEIZING PROPERTY OF STRANGER.—A SHERIFF who, by virtue of a writ of sequestration, seizes specified property named in the writ, the property at the time being owned by, and in the possession of, a stranger to the writ, is not protected by the process in a suit against him by the owner to recover damages for such seizure.

SEQUESTRATION—WRIT OF—PURPOSE.—The writ of sequestration is sued out as an auxiliary writ merely to preserve the property pending the suit, and is intended only to enforce the right to its seizure which the plaintiff has acquired as against the defendant by complying with the statute.

CONVERSION—RIGHTS OF OWNER—SEIZURE BY WRIT OF SEQUESTRATION.—Although the owner of personal property, taken under a writ of sequestration against another, is given a statutory remedy by which he may regain possession and establish his ownership, and may also intervene in the sequestration suit and have his rights adjudicated, these rights do not deprive him of any remedy given by law to the owners of property for the conversion of their goods.

Wynne & Smith, for the appellant.

Kearby & Kearby, for the appellee.

374 WILLIAMS, A. J. This case is brought before us upon certificate from the court of civil appeals of the fifth district, presenting the following statement and question:

“Hufnagel Shoe Company sued B. W. Rose and caused a writ of sequestration to issue directed to the sheriff of Van Zandt county, Texas, in full conformity with our statutes governing the writ of sequestration, commanding him to seize certain specific property, being a lot of shoes. The writ was executed by the sheriff by seizing and taking into his possession said property. At the time of said seizure said property was owned by and in the possession of J. D. Crawford, who was not a party to the suit and a stranger to the writ. The property was destroyed by fire while in the sheriff’s custody. J. D. Crawford brought this suit against the sheriff and his bondsmen to recover the value of the property so seized and taken from his possession.

"Question: Where a sheriff, by virtue of a writ of sequestration issued in conformity with our statutes, seizes certain specified property named in the writ, said property at the time of seizure being owned by and in possession of a stranger to the writ, is such writ a protection to the sheriff in seizing and taking possession of the property, in a suit against him where the stranger seeks to recover damages for such seizure? See *Lackey v. Campbell* (Tex. Civ. App., Nov. 15, 1899), 54 S. W. Rep. 46."

We have been unable to find any decision of this court upon the question certified. But in the case of *Maddox v. Tierney*, 3 Willson, 396, it was held by the court of appeals that an order of sale issued upon a judgment foreclosing a mortgage upon specific property as against the defendant to the action, would not protect the officer in taking such property, if it belonged to and was in possession of another not a party to the suit in which the judgment was rendered. We think ³⁷⁵ that decision was correct, and that the principle upon which it was based applies equally to the question before us.

The writ in general use in other jurisdictions which most closely resembles our writ of sequestration is the writ of *replevin*.

A diversity of opinion has existed among the courts of other states upon the question whether or not that writ will protect an officer who, under its authority, when issued against one party, takes the property described in it from the possession of another to whom it actually belongs. Some of the courts argue that since the writ is fair and regular on its face and commands the officer to seize the property described in it, and he is bound to obey its mandates, he must necessarily be protected in doing so: *Boyden v. Frank*, 20 Ill. App. 175; *Willard v. Kimball*, 10 Allen, 211, 87 Am. Dec. 632; *Shipman v. Clark*, 4 Denio, 446, 47 Am. Dec. 264; *Foster v. Pettibone*, 20 Barb. 350; *Weiner v. Van Rensselaer*, 43 N. J. L. 547; *Watkins v. Page*, 2 Wis. 69 (92); *Weinberg v. Conover*, 4 Wis. 838 (803). Others hold that since the writ is issued at the suit of one person against another, for the purpose of recovering the title or possession, or both, from such other, it does not impart authority to take from the possession of a third person his property: *Stimpson v. Reynolds*, 14 Barb. 508; *State v. Jennings*, 14 Ohio St. 73; *Davis v. Gambert*, 57 Iowa, 239; *West v. Hayes*, 120 Ala. 92, 74 Am. St. Rep. 24.

In many of the decisions first cited, the rulings were limited to cases in which the property of the third party was found in

and taken from the possession of the defendant in the writ, at the reasoning of the courts would seem to extend as well to cases in which the taking was from the possession of the owner himself. In several of them, there are dissenting opinions. The discussions were sometimes called forth in the consideration of the question, whether or not one not a party to writ of replevin, whose property had been seized under it, could himself maintain an independent action of replevin against the officer for its recovery, the courts assuming the question depended upon the other one whether or not the writ authorized the taking of the property, and deciding the cases before them according to their views upon the latter question. Other courts have, however, held, upon different grounds, that the second action of replevin could not be maintained against the officer; the conflict of opinion being even greater on this point than on the other.

It seems to us that the proposition affirmed by authorities first referred to is based upon the mere assumption that the writ obliges the officer to seize the property, whether found in the possession of the defendant in the writ, or in that of a third person owning it. We do not believe such to be the scope of the writ of sequestration. It is sued out as an auxiliary writ, merely to preserve the property pending the suit, by which the plaintiff seeks to recover the title or possession of it from the defendant, whose title to hold it is put in issue. The cause of action is stated and the affidavit made against and the bond given to secure only the party sued. While the writ commands the officer to seize the ³⁷⁴ property sued for, it is intended only to enforce the right to its seizure which plaintiff has acquired as against the defendant by complying with the statute.

To say that the writ authorizes the sheriff to take the property of another from his possession seems to us equivalent to saying that the plaintiff has the right to such action when he has not taken the steps required by law to entitle him to it. How can it be the duty of the sheriff to make such a seizure unless it is the right of the plaintiff to have him do so?

The history of our legislation shows that it was never allowable to take the property of a citizen from his possession without a proper proceeding against him in which security was given for damages and costs which might result. The one hundred and forty-third section of the act of May 13, 1846, to regulate proceedings in the district courts, provided: "That no writ of quia timet, attachment, or any other original writ or process,

whereby the property of any citizen of this state shall be ordered to be seized or taken into custody, shall be issued by any civil officer of this state, or by order of any judge of the same, unless the party applying for such writ or process shall first make affidavit in writing of the truth of the matter set forth in his or her petition, and shall file in the clerk's office of the court where the same is to be sued out and entered a bond with good security, and in a sum at least double the value of the property to be seized and taken, or of the debts and damages claimed to be due, conditioned to pay all costs and damages which the party against whom such suit or process may be sued out shall sustain, by reason of the wrongfully and unjustly suing out of the same; provided, that this section shall not be construed to prevent the issuing of attachments by justices of the peace, under the provisions of any statute authorizing such attachments; and provided, also, that it shall not be so construed as to prevent the issuing of any writ or process to compel the attendance of defaulting witnesses or jurors in any court or tribunal to which they may have been legally summoned, or to any writ or process authorized by law in criminal cases."

The next section of the statute provides for the issuance of writs of sequestration upon prescribed conditions, and this was amended by the act of 1848, but the requirements of article 143 were left in force: *Cheatham v. Riddle*, 8 Tex. 165.

The plain purpose of these provisions was to require a suit with a verified petition against, and a bond to the person whose property was to be seized, before its seizure under any writ was authorized.

In the revisions of the laws that have since been made, the provisions of article 143 have been distributed, so that its requirements applicable to a particular writ have been embodied in the statute regulating that writ. All of the substantial requirements of that article affecting this question have been carried into the present statute concerning sequestration. While a sworn petition may not be necessary, a suit is required ³⁷⁷ with an affidavit and bond which would meet the purposes of the former law.

The sequestration law requires no bond to secure any person but the defendant. It authorizes the defendant, and no one else in the first instance, to give a replevy bond and retain the property, and, if he fails to do so, it authorizes the plaintiff to replevy. It provides for a sale of the property, if it be perishable, in case the defendant does not replevy. There is no pro-

vision whatever in this statute for the protection of the rights of any but the parties to the suit. If it be true that the officer is authorized to invade the possession of a stranger to the action and take his property, it may be replevied by either party to the suit or sold as perishable; and, in case of insolvency of the plaintiff, its owner would be left without substantial redress. In our opinion, the statute contemplates no such result. It requires the party desiring to sue for property to bring his action against him who holds it, and to direct his oath against him, and to make his bond payable to him. When he has complied with these requirements, he has entitled himself to a writ to take the property from the defendant for the purposes of preserving it or securing the fruits of the litigation pending the action, but he has not entitled himself, and therefore cannot require the officer to take the property of any other person. The officer may protect himself, if he finds the property in the possession of a third party and is doubtful as to the ownership by requiring indemnity: *Illies v. Fitzgerald*, 11 Tex. 417.

The statute regulating the trial of the right of property gives to the owner of personal property, taken under a writ against another, a remedy by which he may regain possession and establish his ownership; but this has never been regarded as depriving him of any remedy given by law to owners of property for the conversion of their goods. It is as applicable in levies under attachments and executions as to those made under sequestrations, and can no more be held exclusive in one case than in the other. It cannot be made available without a bond, and the right of the owner to elect whether he will pursue it or resort to his action for damages against the person who has taken his property is an important one, which may, in many cases, be essential to complete redress. It may be true, also, that a third party may intervene in a sequestration suit involving title to personal property and have his rights adjudicated; but, if he may do this, he may also maintain a separate action. In any of these proceedings, he may fail of complete satisfaction for the wrong done him, unless he can hold the officer responsible, while the latter may protect himself in the way indicated.

We answer the question in the negative.

PROCESS—WHEN NOT A PROTECTION.—In executing a writ of attachment or execution, an officer is bound at his peril to take the debtor's goods alone, and he is guilty of trespass in taking those of a stranger: *Overby v. McGee*, 15 Ark. 459, 63 Am. Dec. 49. If an officer sells under execution property not belonging to the debtor,

the owner may maintain an action against him without having notified him of his interest before the sale: *Lothrop v. Arnold*, 25 Me. 136, 43 Am. Dec. 256. See, further, *Bishop v. McGillia*, 80 Wis. 575, 27 Am. St. Rep. 63; monographic note to *Carpenter v. Innes*, 3 Am. St. Rep. 256-259.

ON SEQUESTRATION OF PROPERTY, see *Steele v. Walker*, 115 Ala. 485, 67 Am. St. Rep. 62; note to *Brunswick etc. Co. v. United Gas etc. Co.*, 35 Am. St. Rep. 396.

WESTERN UNION TELEGRAPH COMPANY v. GIFFIN.

[98 Texas, 530.]

DAMAGES — MENTAL ANXIETY — FAILURE TO DELIVER TELEGRAM.—A person is not entitled to recover damages on account of the failure of a telegraph company to transmit and deliver a message, whereby his existing mental anxiety for his family is prolonged.

Beall & Kemp, for the appellant.

P. H. Clarke and Falvey & Davies, for the appellee.

MR. BROWN, A. J. The court of civil appeals for the fourth supreme judicial district has certified to this court the following statement and question:

"In the above styled and numbered cause, pending on appeal in this the court of civil appeals for the fourth district of Texas, at San Antonio, a question of law arises which this court deems advisable to submit to the supreme court for adjudication, and it has accordingly directed me to certify same to your honorable court for decision, it being as follows:

"Explanation: C. W. Giffin left Toyahville with the body of his child to take same to Sabinal for the purpose of interring it in the family burial ground there. He traveled all day by wagon to Marfa, the nearest railroad and telegraph station, arriving there in time for the evening train going to Sabinal. He had left his wife critically sick, and also another child seriously sick of the same disease of which this child had died, at his home remote from neighbors, and with no one to properly care for them. At Marfa he paid for and delivered for transmission this message: 'A. J. Durham, Sabinal, Texas. Will be there to-morrow to bury our baby. C. W. Giffin.' He explained to the operator at the time of sending the message that he was sending it to his brother in law, at Sabinal, where he had other relatives, and that his reasons for sending the same were that

his relatives at Sabinal might be notified in time to meet him on arriving there with the corpse, and that all arrangements might be made for the funeral without delay on plaintiff's arrival; that he had left his folks at home sick, and that he was for that reason anxious to return to them by the west-bound train from Sabinal the next evening, and that this was also a reason for sending the telegram, ⁵³³ and requested the operator, for these reasons, to hasten the sending of the message, who promised a prompt delivery of it.

"The telegram was not sent, and this resulted in no preparations having been made for the funeral, and a delay therein, which caused plaintiff to miss the return train which he would otherwise have taken, thereby delaying him in his return to his family about twenty-four hours. Plaintiff was anxious about his family at home, and this anxiety and distress of mind was prolonged for some twenty-four hours by his having to wait at Sabinal for the next day's train, owing to the failure to deliver the message.

"Question: Was plaintiff entitled to recover damages on account of such prolongation or increase of mental anxiety?"

The failure of the telegraph company to transmit and deliver the message, whereby plaintiff's existing anxiety for his family was protracted, does not give him a right of action against it: *Rowell v. Western Union Tel. Co.*, 75 Tex. 26; *Johnson v. Western Union Tel. Co.*, 14 Tex. Civ. App. 536. This case is not distinguishable from *Rowell v. Western Union Tel. Co.*, 75 Tex. 26, which was approved by this court in refusing writ of error in *Johnson v. Western Union Tel. Co.*, 14 Tex. Civ. App. 536.

TELEGRAM, FAILURE TO DELIVER.—DAMAGES for mental suffering caused by the failure of a telegraph company to transmit and deliver a message cannot be recovered: *Francis v. Western Union Tel. Co.*, 58 Minn. 252, 49 Am. St. Rep. 507; *Morton v. Western Union Tel. Co.*, 53 Ohio St. 481, 53 Am. St. Rep. 648. Compare *Mentzer v. Western Union Tel. Co.*, 83 Iowa, 752, 57 Am. St. Rep. 294; and see the extended note to *Western Union Tel. Co. v. Cooper*, 10 Am. St. Rep. 788-790.

Am. St. Rep. Vol. LXXVII.—W

**BRUSH ELECTRIC LIGHT AND POWER COMPANY v.
LEFEVRE.**

[93 Texas, 604.]

PLEADING A CITY ORDINANCE.—A PETITION which merely sets out the conclusions of the pleader upon the legal effect of a city ordinance, but does not allege the provisions of the ordinance either in terms or in substance, is not sufficiently definite as against a special demurrer.

NEGLIGENCE—PROXIMATE CAUSE—ELECTRIC WIRES. It is no evidence of negligence on the part of an electric company to suspend its uninsulated wires sixteen feet above the street over an awning, which served merely as a shade and protection to the front of the building, and which was not used as a place of resort either for pleasure or for business, since there is no reason to anticipate that persons will be injured thereby.

Terry, Ballinger, Smith & Lee, for the plaintiff in error.

James B. & Charles J. Stubbs and Edwin S. Easley, for the defendants in error.

*** BROWN, A. J. E. and Clara Lefevre, being husband and wife, sued the plaintiff in error in the district court of Galveston county for damages, on account of the death of Paul, charged to have been occasioned by the negligence of the electric light company. The case was tried before a jury and resulted in a verdict and judgment for one thousand dollars for E. Lefevre and three thousand dollars for Clara Lefevre, which judgment was affirmed by the court of civil appeals.

It will not be necessary to give a full statement of the facts in this case. The facts necessary to an understanding of the questions decided by us are as follows: Paul Lefevre was killed by coming in contact with the defendant's wires, maintained and operated by it in the city of Galveston, which wires were suspended diagonally across the intersection of Strand and Twenty-first streets in that city. The wires were fastened upon awnings at the northeast and at the southwest corner of the intersection of said streets. Between these points, two wires extended at the height of about sixteen feet from the street, and at the northeast corner they were fastened upon a trestle about two and one-half feet above the top of the awning in front of the house situated on that corner, and from the top of the trestle they extended down to the awning and thence into the building for lighting purposes. The top of the trestle on the awning was about nineteen feet, and the top of the awning was about sixteen feet from the level of the street. The

wires between the top of the trestle and the awning had been spliced and were entirely bare, having no insulation upon them. E. Lefevre, assisted by his son and others, was engaged in moving a house along Strand toward the east, and, arriving at the intersection of Strand with Twenty-first street, they found that the wires were hanging too low for the house to pass under them, the top of the house being about twenty-four feet above the level of the street. E. Lefevre went upon the awning in question, and, having fastened a rope to the wires to lift them above the house, threw it to his son, who was upon the top of the house that was being moved; and E. Lefevre, in order to assist his son, caught hold of the wires, receiving a shock that produced unconsciousness. Paul, seeing the condition of his father, jumped from the top of the house onto the awning, and, with the help of another, released the father from the wires, and, he being restored to consciousness, Paul fell from some cause and his father fell likewise upon him on the top of the awning. Paul caught with both of his hands the two wires extending from the trestle to the awning and received a shock that produced his death. There is no evidence that this awning was ever used as a place of resort or for any purpose whatever by persons going upon the top of it, and the photographic views of it which were in evidence and are in the statement of facts indicate that it was simply an awning built for shade and protection ⁶⁰⁷ to the sidewalk and the front of the house to which it was attached.

We shall discuss but two questions presented by the application: 1. Were the allegations of the petition, setting up the ordinance which required the wires to be raised twenty-five feet above the street, sufficiently definite? 2. Was there any evidence of negligence on the part of the plaintiff in error which proximately caused the death of Paul Lefevre?

The plaintiffs' petition contains these allegations: "That in obedience to the ordinances of the said city of Galveston, it is and was on the day and date above named the duty of the defendant company to cause all of its electric wires to be suspended and keep them suspended at least twenty-five feet above the grade of the streets, and to cause same to be properly and completely insulated from surface contact. . . . That said wires were not suspended twenty-five feet above the grade of the streets at said point, but were suspended only about fifteen feet, and by reason of this fact it became necessary to lift said wires higher in order that the house might pass thereunder."

The allegations of the petition as set out are the conclusions of the pleader upon the legal effect of the ordinance, but the provisions of that ordinance are not alleged either in terms or in substance so that the court could, from the plea, determine what was required by it of the electric light company. The special exception interposed by the defendant below to the foregoing allegations of the petition should have been sustained: *Austin v. Walton*, 68 Tex. 507.

There can be no liability for the injury in this case, unless, from all the circumstances, the electric light company could reasonably expect that some person might be injured by its failure to cover the wires placed by it upon the awning where the deceased received his injury: *Texas etc. Ry. Co. v. Bigham*, 90 Tex. 225. In the case cited, Chief Justice Gaines, on behalf of the court, expressed the rule in the following language, quoting from the supreme court of the United States in the case of *Milwaukee etc. Ry. Co. v. Kellogg*, 94 U. S. 469: "But it is generally held that in order to warrant a finding that negligence or an act not amounting to wanton wrong is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." This is probably as accurate a statement of the doctrine as can be given, and is substantially that generally laid down by the authorities." Applying this rule to the facts of this case, the inquiry arises, Would an ordinarily prudent man, looking at the surroundings as they then appeared, have reasonably expected that any person would be upon the awning and might be injured by coming in contact with the exposed wires? If such a consequence might have been reasonably foreseen, then the plaintiff in error would be liable for the injury, under the facts of this case, unless there be some other defense; if not, then it cannot be held liable for the death of Paul Lefevre. If the testimony is such that a jury might have found that the electric light company ought to have anticipated the injury, then this court cannot inquire into the correctness of such a conclusion, although it might differ with the jury as to the correctness of the verdict.

In the facts of this case, there is not a scintilla of proof that the awning had been used by any person as a place of resort either for pleasure or for business. Looking at the photographic views of the situation, the awning appears to be such as is common in the towns and cities as a protection to the

front of the building, with no railing or other protection upon the top or roof showing the intention for persons to resort there for any purpose whatever. If a man of ordinary prudence had been placing the wires at the same points, the facts would not have notified him that probably some one would be injured by them.

From the street and the sidewalk to the place where the exposed wires were located is a distance of about sixteen feet, which must have been at least ten feet above the heads of men of ordinary height passing along the street, and there were no means by which passers upon the street or sidewalk could come in contact with the wire. It was, therefore, not negligence with regard to persons traveling along the street or sidewalk, to leave the wire exposed, because there was no reasonable and scarcely a possible chance for such persons to be injured thereby.

We are of opinion that there is no evidence upon which a jury could base a verdict in favor of the defendants in error, and the trial court erred in refusing to give the requested instruction to find for defendant.

For the error of not sustaining the exception to the plaintiff's petition and because there is no evidence of negligence on the part of the electric light company, the judgments of the district court and court of civil appeals are reversed and this cause is remanded.

PLEADING CITY ORDINANCE.—Where a plaintiff bases his right of action on the negligence of the defendant in violating a city ordinance he must set forth so much of the ordinance as is relied upon to support the cause of action: *Southern Ry. Co. v. Prather*, 119 Ala. 588, 72 Am. St. Rep. 949.

ELECTRIC COMPANIES—DUTY AS TO WIRES.—An electrical company in erecting and maintaining its wires is bound only to anticipate such combinations of circumstances and accidents and injuries therefrom as it reasonably may forecast as likely to happen: *Snyder v. Wheeling Electrical Co.*, 43 W. Va. 661, 64 Am. St. Rep. 922. On the duty of electric companies properly to insulate their wires, see *Hector v. Boston etc. Co.*, 174 Mass. 212, 75 Am. St. Rep. 800; *Perham v. Portland Electric Co.*, 33 Or. 451, 72 Am. St. Rep. 780.

CASES
IN THE
SUPREME COURT
OF
UTAH.

**DUPEE v. SALT LAKE VALLEY LOAN AND TRUST
COMPANY.**

[20 Utah, 108.]

MORTGAGES — PARTIAL FORECLOSURE — CONTINUATION OF LIEN.—Mortgaged property may be sold under foreclosure to satisfy a part of the debt due, and if notice of the action is filed at the commencement of the suit, the lien of the entire debt may be preserved by the decree of partial foreclosure, as against subsequent encumbrancers or redemptioners.

MORTGAGES — PARTIAL FORECLOSURE — PRESERVATION OF LIEN.—If a decree of foreclosure for the portion then due of the mortgage debt recites the preservation of the lien for the portion of the debt not yet due, and an announcement of that fact is made at the sale, it is not necessary that such announcement be incorporated in the notice or certificate of sale nor in the deed.

LIS PENDENS.—THE OBJECT of notice of a pending action is to keep the subject of the suit within the control of the court until judgment is rendered. The *lis pendens* may be defined to be the jurisdiction, power, or control which courts acquire over property involved in a suit pending the continuance of the action and until final judgment therein.

MORTGAGES — FORECLOSURE — PARTIES BOUND BY DECREE.—Parties, purchasers, and redemptioners, in foreclosure proceedings, are bound by the decree, and redemption can be made subject only to the conditions therein imposed. A redemptioner becomes the assignee of the purchaser, succeeds only to his rights, and cannot claim under one portion of the decree and repudiate another.

MORTGAGES — PARTIAL FORECLOSURE — NOTICE TO REDEMPTIONER.—A redemptioner from a purchaser at a foreclosure sale for part of the mortgage debt under a decree continuing the lien of the mortgage in force is not entitled to notice, after the mortgagee has given notice to the attorney of record, of a motion made to the court for a sale of the property upon the maturity of the entire mortgage debt.

MORTGAGES—PARTIAL FORECLOSURE.—If a foreclosure of mortgage is had before the whole debt is due, and the decree directs a sale for the debt then due, subject to a lien for the part not due, and the mortgagee who holds the entire debt purchases and receives a deed for the premises, this is a satisfaction of the entire debt, but if redemption is made from the purchaser by the mortgagor or his judgment creditor, the debt not due at the time of the sale and the lien remain in force and the mortgagee may again foreclose as to it.

MORTGAGES — PARTIAL FORECLOSURE — EQUITY. — Mortgage sales are controlled by the court so that no injustice may be done to either party, and if only a part of the mortgage debt is due, and foreclosure on that part is sought, but the mortgaged premises cannot be sold in parcels without injury, that fact should be shown to the court and a decree rendered accordingly.

Action in ejectment to recover possession of property admitted to be in the possession of the defendant and respondent. Both parties claim title under foreclosure proceedings on a mortgage given by J. W. Jones and wife to J. A. Dupee. The latter foreclosed the mortgage for a portion of the mortgage debt then due, and at the foreclosure sale the whole property was sold in one parcel by the United States marshal to F. B. Stephens, for the amount of the decree and expenses. The defendant and respondent redeemed from such mortgage sale, and now seeks to hold the entire property free of the entire mortgage debt. Judgment for the defendant, and plaintiff appeals.

Stephens & Smith, for the appellant.

Pierce, Critchlow & Barrette, for the respondent.

¹¹¹ **MINER, J.** It is urged by the respondent that in the marshal's deed to Stephens, and in his notice and certificate of sale no mention was made that the sale was had subject to the lien for the principal sum due upon the mortgage, as provided in the decree, and that the respondent took the property by its redemption free from the lien claimed to be reserved in the decree, and that the sale to Stephens without such reservation vested the title in the respondent ¹¹² as redemptioner. At the time the decree was entered the court found that no part of the principal was due, but did find that the ground rents and taxes were due and had been paid by the plaintiff under the provisions of the deed, and granted a decree for the sale of the property for that amount, but decreed that the plaintiff was not then entitled to a foreclosure for the entire sum secured by the mortgage; that the principal sum of six thousand dollars and interest still remained a lien on the mortgage premises, and that the plaintiff was not entitled to foreclose the same

for that sum until a further breach of covenants in the trust deed.

The record shows that *lis pendens* was duly filed; that the marshal, at the time of the first sale, publicly announced that it was made subject to the lien of the mortgage and publicly read the clause in the decree providing that the mortgage was a lien upon the premises for the remaining debt secured to be paid by the mortgage. It is claimed that evidence of this announcement was not admissible. We are of the opinion that this evidence was admissible. It shows that independent of the decree the appellant did not intend to waive or release the lien of the mortgage for the balance of the debt covered by the decree, and that all persons at the sale had notice of the lien reserved in the decree outside of the notice contained in the decree itself. The decree directed the principal sum owing upon the mortgage to remain a lien upon the premises, and the first sale was made under an announcement by the marshal to that effect. There is nothing in the statute requiring such announcement to be incorporated into the certificate, notice, or deed, and the failure of the marshal to so incorporate it does not modify or affect the original decree, or waive or release the lien reserved in the decree. The marshal had no power to set aside or annul a decree of the ¹¹³ court. It was sufficient in this case, although not of vital importance, that the marshal announced the lien at the time of the sale. By this means all persons present, including the attorneys in the case, had actual notice: *Hughes v. Frisby*, 81 Ill. 188; *Spalding v. Chandler*, 160 U. S. 394; 2 *Jones on Mortgages*, sec. 1547.

When the foreclosure suit was commenced a *lis pendens* was filed. The defendants and their attorneys knew of and had actual notice of the pendency of the action, and the subsequent rendition of the decree, and that the mortgage lien was still upon the land. The object of notice of *lis pendens* is to keep the subject of the suit or res within the power and control of the court until the judgment or decree shall be entered, so that courts can give effect to their judgments and that the public shall have notice of the pendency of the action. (*Lis pendens* may be defined to be the jurisdiction, power, or control which courts acquire over property involved in a suit, pending the continuance of the action, and until its final judgment therein.") This constructive notice of filing the complaint as required by the statute is equivalent to actual notice: 13 Am. &

ng. Ency. of Law, 889; Whittaker v. Greenwood, 17 Utah, 3.

The purchaser at a public sale must take notice of the terms of the decree: McKinley-Lanning etc. Co. v. Hamer, 52 Neb. 309.

The decree was a matter of public record and notice to the parties and all persons claiming through and under them that the lien of the mortgage remained on the property. The parties, the purchaser, the attorneys for the parties were present at the sale with notice of the decree, ¹¹⁴ and are supposed to have known its terms, and are bound by its provisions. The respondent, by its attorney, examined the decree before his client redeemed. By the decree it was not intended that the lien of the mortgage for principal and interest should be extinguished by a sale thereunder for ground rent and taxes even if the sale be made to the mortgagor or judgment creditor. The parties, purchasers, and redemptioners were anchored to the decree, and were bound by it, and cannot escape its provisions. If the clause referred to had not been contained in the decree, a different conclusion might be reached. By redeeming, the respondent became, by operation of law, the assignee of the purchaser, and succeeded to his rights, and no more. When the decree imposed conditions to the sale, respondent redeemed subject to those conditions. He claims title under that decree now. He cannot be heard to claim under a part of it that is advantageous to him, and reject that part which is to his disadvantage. He redeemed under it, claims title under it, and is bound by it. At most, the respondent was but a judgment creditor. By the provisions of the decree all persons claiming under Jones, and all persons having liens by judgment or otherwise subject to the mortgage, or subsequent to the filing of the lis pendens were forever barred and foreclosed. As owner of the judgment, respondent had a right to redeem and pay the lien created by the decree, and nothing more.

Respondent, a judgment creditor of the mortgagor, having redeemed from the purchaser, the mortgage debt being due at the time of the sale, the lien continued to remain in force under the decree, after the sale. Under such circumstances, it was proper for the mortgagee on motion, after due notice to the attorney of record in the case, if an appearance had been had, to obtain an order ¹¹⁵ for the sale of the property under section 3502 of the Revised Statutes of 1888. It would not be necessary to serve this notice of motion on the redemptioner

or judgment creditor as claimed by the respondent. It was sufficient to serve it on the attorney of the defendants, who had appeared in the action.

It was held in *Hughes v. Friaby*, 81 Ill. 188: "Where a foreclosure of a mortgage is had before the whole debt is due, and the decree directs a sale for the debt due, subject to the lien for the part not due, if the mortgagee, the holder of the entire debt, purchases and receives a deed for the premises, it will be a satisfaction of the whole debt, but if redemption is made from the purchaser by the mortgagor, or judgment creditor of the mortgagor, the debt not due at sale and the lien will remain in force, and the mortgagee may again foreclose as to it": *Hocker v. Reas*, 18 Cal. 651; *Bank of Napa v. Godfrey*, 77 Cal. 612.

Section 3502 of the Revised Statutes of 1898 provides: "If the debt for which the mortgage, lien, or encumbrance is held is not all due, as soon as sufficient of the property has been sold to pay the amount due, with costs, the sale must cease, and afterward, as often as more becomes due for principal or interest, the court may, on motion, order more to be sold. But if the property cannot be sold in portions without injury to the parties, the whole may be ordered to be sold in the first instance, and the entire debt and costs paid, there being a rebate of interest where such rebate is proper."

Our statute is like that of California. Under this statute it is held in California that: "The proper practice under the code is to apply by motion, and not by petition, for a sale of more of the mortgaged premises as often as more becomes due for principal or interest. The failure ¹¹⁶ to sell a portion of mortgaged property under a decree of sale for a first installment of interest will not prevent a sale of the whole property on motion, when the unmatured portions of the note fall due. The provision of the code authorizing the court on motion to order more to be sold, after a previous sale of sufficient of the property to pay the amount due, is construed to be for the benefit of the debtor, and not to impose upon him the cost of several sales": *Bank of Napa v. Godfrey*, 77 Cal. 612.

The statute points out the proper procedure in such cases. Under it, if the debt secured is not all due, as soon as sufficient of the property has been sold to satisfy the amount decreed to be paid, the sale should cease, and thereafter as soon as more becomes due for principal or interest, the court may or may not in the same proceeding order more sold. But if it is made

to appear to the court in the first instance that the property cannot be divided or sold in portions without injury to the parties, the whole may be ordered sold, and the entire debt and costs paid making proper rebate in interest.

The decree permits a sale of the property, or so much thereof as may be necessary to satisfy the decree, and which may be sold separately without material injury to the parties, to be sold.

In this case, the mortgage not being due, it would have been better practice, if the facts justified it, to have made a showing to the court that the property was so situated that it could not be sold in portions without injury to the parties, and thereon to have obtained a decree for sale accordingly. Then the sale could have been made in one parcel without any question arising thereon, and without calling upon the officer to act upon his judgment or discretion to sell the property in parcels or as a whole. Or if it appeared to the court that the property could be ¹¹⁷ divided and sold in parcels without injury to the parties, then the decree should have been rendered accordingly. The proceeding to obtain the order on motion for the sale of the property under the decree was in conformity with the statute. The appellant, under his decree, obtained title to the mortgaged premises, but subject to redemption by those in a position to redeem.

The first sale to Stephens, from which respondent redeemed, was made subject to the lien of the principal and interest of the mortgaged debt referred to in the decree, and all rights of the respondent, except to redeem, were extinguished by the subsequent sale to appellant under such decree and order.

Mortgage sales in equity will be controlled by courts of equity, so that no injustice may be done to either party: *Campbell v. Macomb*, 4 Johns. Ch. 534.

Other questions are discussed in the briefs of the respective counsel, but upon careful examination we find that the findings and judgment appealed from are erroneous and not sustained by the evidence.

The case is reversed and remanded to the district court, with directions to set aside the judgment and findings, and to enter findings and judgment in favor of the appellant, as prayed for in the complaint.

Appellant is entitled to costs.

Bartch, J., and Baskin, J., concur.

MORTGAGE FORECLOSURE.—WHERE ONLY PART of the debt is due, a sale of the whole property is not a matter of course, but if the person in possession is not responsible for the debt and the security is insufficient, the sale of the whole, or so much as may be necessary to pay the entire debt and costs, will be ordered, unless the defendant pays the installment due or gives security for the payment of the residue: *Suffern v. Johnson*, 1 Paige, 450, 19 Am. Dec. 440. However, foreclosure for an installment due before the principal amount and a sale of the property thereunder exhaust the remedy of the creditor in this respect, and pass an absolute title to the purchaser: *Poweshlek County v. Dennison*, 36 Iowa, 244, 14 Am. Rep. 521.

MORTGAGE SALES WILL BE CONTROLLED BY THE COURT so that no injustice will be done to either party, and a part or the whole of the property sold as may best conduce to that end: *Suffern v. Johnson*, 1 Paige, 450, 19 Am. Dec. 440.

MORTGAGE FORECLOSURE—CONCLUSIVENESS OF.—A decree in a suit foreclosing a mortgage is binding on the parties to the suit and those purchasing from them during its pendency: *Norris v. Ile*, 152 Ill. 190, 43 Am. St. Rep. 233.

LIS PENDENS.—THE OBJECT of lis pendens is not, primarily, notice, but to hold the subject of the suit within the power of the court, so as to enable it to pronounce judgment thereon: *Brown v. Cohn*, 95 Wis. 90, 60 Am. St. Rep. 83. The law of lis pendens is the subject of the monographic note to *Stout v. Philippi Mfg. etc. Co.*, 56 Am. St. Rep. 853-878.

McLAUGHLIN v. KIMBALL

[20 Utah, 254.]

CORPORATIONS — INSOLVENCY — STOCKHOLDERS — LIABILITY.—AN ACTION TO ENFORCE the statutory liability of stockholders in an insolvent corporation must be brought by a creditor thereof, and cannot be maintained by a receiver, either general or special.

Bennett, Harkness, Howat, Bradley & Richards and Dickson, Ellis & Ellis, for the appellants.

Brown & Henderson, for the respondent.

²⁸¹ **HART, D. J.** The principal question to be decided in this case is whether a special receiver can recover the statutory liability of a stockholder of an insolvent banking corporation above the amount due the corporation in payment of his stock. The decision of this court in the case of *Steinke v. Loofbourov*, 17 Utah, 252, decided since the judgments for plaintiff were rendered in the cases at bar, goes far toward determining the question here involved. It was decided in that case that a gen-

ral receiver of a banking corporation could not maintain suit against stockholders for their statutory liabilities. The only material difference between that case and the one at bar is that ²⁶² there the plaintiff was the general receiver of the bank and its assets, appointed at the suit of a stockholder; while here the plaintiff is a special receiver appointed at the suit of a judgment creditor in behalf of himself and all other creditors for the purpose of collecting the fund due upon the statutory liabilities of the shareholders. In the Steinke case this court said: "There appears to be no necessity for thrusting the bank or its receiver between the creditors and the stockholders.

. . . When it becomes necessary to resort to the individual liability of the stockholders above the amount of their stock, under a statute similar to the one quoted, the decided weight of authority is to the effect that the suit should be brought by the creditors, though there is a substantial conflict which cannot be reconciled; but we think the more reasonable and better rule is as we have stated it."

In addition to the above-mentioned case and the authorities there referred to, the following may be cited as sustaining the same rule: *Cook on Stock and Stockholders*, sec. 218; *Zang v. Wyant*, 25 Colo. 551, 71 Am. St. Rep. 145; *Thompson on Corporations*, sec. 3560; *Runner v. Dwiggins*, 147 Ind. 238; *Morse on Banks and Banking*, 3d ed., sec. 696.

Since this court has chosen to adopt the rule that the creditors and not the general receiver of the insolvent company are the proper parties to collect the statutory liabilities of the stockholders, we do not think it would be wise to fritter away the rule by making exceptions based upon finely drawn distinctions as to the name by which the receiver is called, the form of the order appointing him, or whether he is appointed in a suit brought by the creditor or the stockholder. To adopt such distinction would be to add perplexing uncertainties to a rule which should remain fixed and absolute unless changed by the legislature. There is no case cited to this point by counsel that is not ²⁶³ squarely met by the decision of this court above referred to. It is urged that a distinction should be made where a receiver is appointed in a creditor's suit, and not in a suit brought by one of the stockholders. We do not think it would be either logical or expedient to make such a distinction.

The principal reason why the courts have not permitted receivers of insolvent corporations to recover the statutory liabilities of stockholders, over and above the amount due the

corporation as assessments on their stock is, that this additional statutory liability of stockholders is not an asset of the corporation which the receiver is authorized to take into his possession, but belongs to creditors, in the event that their claims cannot be paid out of the corporate assets. But even this obvious truth that the statutory liability is not a corporate asset is disregarded in such cases as *Wilson v. Book*, 13 Wash. 676, *Watterson v. Masterson*, 15 Wash. 511, and *Cushing v. Perot*, 175 Pa. St. 66, 52 Am. St. Rep. 835. The doctrine of these cases this court has declined to adopt. The fact that the general receiver is appointed in a suit brought by a creditor and not a stockholder should be considered a mere incident. The receiver stands in the same representative capacity in the one case as in the other. If appointed at the suit of a creditor to collect and take possession of the corporate assets, he represents all the parties interested—the creditors, stockholders, and the corporation. If appointed in a suit by the stockholders to wind up the affairs of the corporation, he likewise represents the same parties.

The case of *State v. Union Stock etc. Co.*, 103 Iowa, 549, is decided upon the statute of that state, and also upon what appears to be a misapprehension of the case of *Story v. Furman*, 25 N. Y. 214. That the latter case was decided under a special act of that state ²⁶⁴ passed in 1852 for the dissolution of a corporation organized under the law of 1811 is clear from the decision itself. That the case is so understood in the jurisdiction rendering the same is shown in *Farnsworth v. Wood*, 91 N. Y. 308. Although the case of *Story v. Furman*, 25 N. Y. 214, is beyond all question decided by reason of the statute, there are certain obiter dicta in the case which have sometimes been quoted and relied upon as though an essential part of that case.

Admitting that it would be a convenient and desirable remedy for the receiver of a corporation to collect for the creditors their dues from the stockholders, the relief is to be sought at the hands of the legislature, and not the court.

In the case at bar, a general receiver is appointed at the suit of a creditor. The same creditor, after reducing his claim to judgment, brings suit against the corporation represented by the receiver he has had appointed, seeking nothing against the corporation, the relief sought being against the stockholders. The stockholders are not made parties to the suit except as they are represented through the receiver. The creditors

are only parties to the suit by the same being brought by one creditor in behalf of all. No time is given either to the other creditors or to the stockholders to come in and directly participate in the proceedings for the appointment of the special receiver, but on the same day that the suit is filed the general receiver consents to the appointment of himself as the special receiver, and then, as special receiver, he brings the suit at bar. There was no judicial determination of who were the creditors, the amounts of their claims, nor of the exact amount due the creditors after exhausting the assets of the corporation. The recital in the order appointing the general receiver that there will be a deficiency in the payment of the corporate indebtedness exceeding fifty thousand dollars, ²⁶⁵ the amount of the capital stock of the corporation, must be considered purely as an ex parte order. If a special receiver appointed under such circumstances should be allowed to sue in behalf of the creditors for the statutory liabilities of stockholders, why would not a special receiver, appointed in the first suit by the creditors against the corporation, have the same powers? If so—and it is difficult to see how any material distinction can be made between the two instances—then the question would have to turn upon the particular powers that the court purported to confer upon the receiver in its order appointing him.

If the court has the power to confer such special power upon the receiver, why not confer them upon the general receiver at the time of his appointment, and direct him to sue stockholders on their statutory liabilities in the event that the corporate assets are insufficient to pay the corporate creditors? The remedy sought in this case would be a convenient one, no doubt, if the statute had authorized it, as the statutes in some states have done; but if the receiver has no such authority under the law by virtue of his office as receiver, as this court has determined, what authority has the court to confer this power upon him? There is no fund in the possession of the court which this special receiver is to take charge of; neither is he to collect assets belonging to the corporation, the general receiver having been appointed for that purpose. Section 3114 of the Revised Statutes of Utah of 1898, subdivision 6, enacts: "A receiver may be appointed by the court in which an action is pending or has passed to judgment, or by the judge thereof. . . . 6. In all other cases where receivers have been appointed by the usages of courts of equity." Is it the usage of courts of equity to appoint a receiver under such circumstances and

with such powers as in this ²⁰⁰ case? If so, no such case has been called to the attention of the court. Simply because there are a large number of persons, each having a claim against one or more persons, should the court, in the absence of a statute, on motion of one or more persons having a claim, appoint a receiver to bring suit as such in behalf of all the creditors? If so, there would be scarcely any limit to which the courts would not be burdened in doing for individuals what they should do for themselves.

A receiver is but "the hand of the court." Unless the necessities of the occasion require, individuals, and not the officers of the court, should bear the responsibility of litigating their own claims. If a receiver should be appointed in such a case, where can the line be drawn, unless drawn by the statute? If several creditors are entitled to a receiver to collect their dues from several stockholders, a receiver could be appointed in any other cause where several plaintiffs are seeking recovery against several defendants. While perhaps not quite so convenient a remedy, the creditor has means of complete relief in a creditor's suit against the stockholders. This is the relief pointed out in the decision of this court heretofore referred to, and is the remedy that would have doubtless been followed had not these proceedings been instituted and trial had before the decision rendered in the causes referred to.

It is ordered that these causes respectively be remanded to the trial court, with instructions to dismiss the same at the costs of the respondent.

Baskin, J., and McCarty, D. J., concur.

STOCKHOLDERS' LIABILITY, WHO MAY ENFORCE.—The statutory liability of the stockholders in an insolvent corporation is enforceable by the creditors alone: *Parker v. Caroline Sav. Bank*, 53 S. C. 583, 69 Am. St. Rep. 888. The receiver of the corporation cannot maintain a suit to enforce such liability: *Zang v. Wyant*, 25 Colo. 551, 71 Am. St. Rep. 145.

**FARMINGTON GOLD MINING COMPANY v. RHYMNEY
GOLD AND COPPER COMPANY.**

[20 Utah, 363.]

MINES AND MINING—LOCATION MARKS—NOTICE.—Whether a location of a mine is distinctly marked on the ground is a question of fact to be determined by proof allunde. The location notice need not state how the claim is marked on the ground.

MINES AND MINING—FINDING AS TO CLAIM—PRESUMPTION ON APPEAL.—A finding by the trial court that plaintiff has been in possession of a claim or mining location, and has in good faith developed and worked it, expending large sums of money thereon, and at all times complying with all mining laws and regulations, must be presumed to be correct on appeal.

MINES AND MINING—LOCATION NOTICE—SUFFICIENCY.—If a mining location is made in good faith, the locator is not held to a strict compliance with the law in respect to his location notice; and if, by any reasonable construction, in view of the surrounding circumstances, the language employed in the notice as to description imparts notice to subsequent locators, it is sufficient.

MINES AND MINING — LOCATIONS — CONSTRUCTION OF LAW.—The statute respecting the location of mining claims is construed liberally, and the sufficiency of the location and notice thereof, with reference to natural objects or permanent monuments, is simply a question of fact.

J. H. Moyle, J. M. Zane, Young & Moyle, and D. H. Wells, Jr., for the appellant.

Wilson & Smith, for the respondent.

³⁶⁶ **BARTCH, C. J.** The main question presented for our consideration in this case is, whether the notice of location of the Rhymney mining claim, with the supplementary proof, was properly admitted in evidence. The ground of the objection appears to be the uncertainty in the description. The notice reads as follows:

"Notice is hereby given that the undersigned having complied with the requirements of section 2324 of the Revised Statutes of the United States and the local laws, customs, and regulations of this district, has located 1500 feet in length by 600 feet in width on this the Rhymney Mine, lode, vein, or deposit bearing gold, silver, and other precious metals, situated in the Farmington Mining District, Utah Territory, the location being described and marked on the ground as follows, to wit: Situated about ³⁶⁷ one mile and a half eastward from the depot under a large cliff of rock. I claim from this notice 750 feet southeasterly to a monument of stone; thence northwesterly from this notice 750 feet to a monument of stone. The mining claim above described shall be known as

the Rhymney Mine. Located this seventh day of January, 1884. Names of Locators.

"HYRUM E. HAYNES."

The notice was recorded May 19, 1884. The appellant insists that it was so indefinite and uncertain that it did not impart notice to the public, and that the claim was not tied to a natural object or permanent monument so as to identify it, as required by section 2324 of the Revised Statutes of the United States, which, so far as material here, reads: "The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim."

The first clause of this provision requires the "location to be distinctly marked on the ground," but whether or not a claim is so marked is a question of fact to be determined from proof aliunde, and it is not required to be stated in the notice how the claim is marked on the ground.

"Where the right of possession is founded on an alleged compliance with the law relating to a valid location, all the necessary steps, aside from the making and recording of the location certificate, must, when contested, be established by proof outside of such certificate. The record of the certificate is proof itself of its own performance as one of such steps, and in regular order, generally speaking, ³⁶⁸ the last step in perfecting the location": Lindley on Mines, sec. 392.

Whether, at the trial, all the necessary facts to constitute a valid location of the Rhymney mine were shown to exist, we are unable to determine from the evidence, because all the testimony relating to the same does not appear in the record, but the court found, inter alia, that the location of the claim was made in January, 1884, by the defendant's predecessor in interest; that ever since, such predecessor and the defendant have been in the quiet and peaceable possession thereof, except when disturbed by the plaintiff, and have in good faith developed and worked the claim and expended large sums of money thereon; and that at all times they have complied with all the laws of the United States and the local laws, customs, and regulations of the mining district. In the absence of evidence showing the contrary, we must assume that this finding was correct, and consequently hold that the claim was sufficiently

marked on the ground. The date of the location and the locator appear in the certificate, as required by the provisions of the statute quoted.

In addition to the date of location and name of the locator, however, the statute requires the record to show such a description of the claim located "by reference to some natural object or permanent monument, as will identify the claim."

It must be admitted that the notice is indefinite in not stating the number of feet in width claimed on each side of the point of discovery or monuments of stone referred to therein, and should, therefore, be limited to an equal number of feet on each side. When so limited it would seem to be sufficiently definite, and thus viewed the description would seem sufficient to indicate to a subsequent ³⁶⁹ locator the intention of the claimant as to the number of feet claimed.

Nor, under the circumstances as shown by the proof, is the objection to the location that the claim was not so tied to a natural object or permanent monument as is required by law well grounded. The notice indeed appears to be somewhat uncertain in not stating the kind of depot referred to, and not giving the exact distance and direction the claim is from the depot, but these were matters of fact which could be shown by evidence outside the notice, and, on this point, the record contains evidence showing that at the time the location was made the Union Pacific railway depot was the only depot in the mining district where the claim was located; that there was but one large cliff of rocks one and one-half miles east of that depot; that the Rhymney claim was located at the base of that cliff of rocks according to law; and that a vein or lode was discovered by the locator within the limits of the claim.

Under the circumstances thus shown in evidence the location was sufficient to impart notice to any subsequent locator of the fact of an asserted claim, and the notice, although imperfect, supplemented by such proof was properly admitted in evidence.

With just how much accuracy the description of a mining claim, in reference to a natural object or permanent monument, must be stated in the notice of location is not set forth in the statute, and where, as in this case, the location was evidently made in good faith, we are not disposed to hold the locator to a very strict compliance with the law in respect to his location notice. If, by any reasonable construction, in view of the surrounding circumstances, the language employed in the description will impart notice to subsequent locators, it is sufficient.

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The notice was recorded May 19, 1884. The appellant insists that it was so indefinite and uncertain that it did not impart notice to the public, and that the claim was not tied to a natural object or permanent monument so as to identify it, as required by section 2324 of the Revised Statutes of the United States, which, so far as material here, reads: "The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim."

The first clause of this provision requires the "location to be distinctly marked on the ground," but whether or not a claim is so marked is a question of fact to be determined from proof aliunde, and it is not required to be stated in the notice how the claim is marked on the ground.

"Where the right of possession is founded on an alleged compliance with the law relating to a valid location, all the necessary steps, aside from the making and recording of the location certificate, must, when contested, be established by proof outside of such certificate. The record of the certificate is proof itself of its own performance as one of such steps, and in regular order, generally speaking, ³⁶⁸ the last step in perfecting the location": Lindley on Mines, sec. 392.

Whether, at the trial, all the necessary facts to constitute a valid location of the Rhymney mine were shown to exist, we are unable to determine from the evidence, because all the testimony relating to the same does not appear in the record, but the court found, *inter alia*, that the location of the claim was made in January, 1884, by the defendant's predecessor in interest; that ever since, such predecessor and the defendant have been in the quiet and peaceable possession thereof, except when disturbed by the plaintiff, and have in good faith developed and worked the claim and expended large sums of money thereon; and that at all times they have complied with all the laws of the United States and the local laws, customs, and regulations of the mining district. In the absence of evidence showing the contrary, we must assume that this finding was correct, and consequently hold that the claim was sufficiently

marked on the ground. The date of the location and the locator appear in the certificate, as required by the provisions of the statute quoted.

In addition to the date of location and name of the locator, however, the statute requires the record to show such a description of the claim located "by reference to some natural object or permanent monument, as will identify the claim."

It must be admitted that the notice is indefinite in not stating the number of feet in width claimed on each side of the point of discovery or monuments of stone referred to therein, and should, therefore, be limited to an equal number of feet on each side. When so limited it would seem to be sufficiently definite, and thus viewed the description would seem sufficient to indicate to a subsequent ³⁶⁹ locator the intention of the claimant as to the number of feet claimed.

Nor, under the circumstances as shown by the proof, is the objection to the location that the claim was not so tied to a natural object or permanent monument as is required by law well grounded. The notice indeed appears to be somewhat uncertain in not stating the kind of depot referred to, and not giving the exact distance and direction the claim is from the depot, but these were matters of fact which could be shown by evidence outside the notice, and, on this point, the record contains evidence showing that at the time the location was made the Union Pacific railway depot was the only depot in the mining district where the claim was located; that there was but one large cliff of rocks one and one-half miles east of that depot; that the Rhymney claim was located at the base of that cliff of rocks according to law; and that a vein or lode was discovered by the locator within the limits of the claim.

Under the circumstances thus shown in evidence the location was sufficient to impart notice to any subsequent locator of the fact of an asserted claim, and the notice, although imperfect, supplemented by such proof was properly admitted in evidence.

With just how much accuracy the description of a mining claim, in reference to a natural object or permanent monument, must be stated in the notice of location is not set forth in the statute, and where, as in this case, the location was evidently made in good faith, we are not disposed to hold the locator to a very strict compliance with the law in respect to his location notice. If, by any reasonable construction, in view of the surrounding circumstances, the language employed in the description will impart notice to subsequent locators, it is sufficient.

Prospectors, ³⁷⁰ as a rule make no pretensions of scholarship or the art of composition, are neither surveyors nor lawyers, and if, in their notice of location, technical accuracy of expression were an absolute requirement, the object of the law, which doubtless is the encouragement and benefit of the miners, would in many cases be frustrated, and injustice would result, by the disturbing of possession after much hard labor performed and money in good faith expended. Therefore, mere imperfections in the notice of location will not render it void. Courts have usually construed the statute respecting the location of mining claims with much liberality, and the sufficiency of the location with reference to natural objects or permanent monuments is simply a question of fact: *Lindley on Mines*, sec. 381, 383; *Erhardt v. Boaro*, 113 U. S. 527; *Bennett v. Harkrader*, 158 U. S. 441; *Brady v. Husby*, 21 Nev. 453; *Flavin v. Mattingly*, 8 Mont. 242; *Gamer v. Glenn*, 8 Mont. 371; *Mt. Diablo Min. etc. Co. v. Callison*, 5 Saw. 439; *Wilson v. Triumph Con. Min. Co.*, 19 Utah, 66, 75 Am. St. Rep. 718.

According to the record the Rhymney claim was located in 1884 by the respondent's predecessor, and the same ground was, in 1896, attempted to be located as the Gray mining claim by the appellant. For twelve years, as appears, prior to the attempted location, the respondent and its predecessors in interest had located, worked, and developed the claim, expended large sums of money thereon, and substantially complied with all the laws and the customs and regulations of the mining district. Under these circumstances, to permit the appellant to recover on purely technical grounds would not only be a great injustice to the respondent, but, doubtless, would be a menace to the titles of many mining properties in ³⁷¹ this state which hitherto have been unquestioned and unquestionable.

The record presents nothing which justifies a reversal of this case.

The judgment is affirmed, with costs.

Miner, J., and Baskin, J., concur.

MINES.—NOTICES OF LOCATION are to be liberally construed: Note to *Donahue v. Meister*, 22 Am. St. Rep. 291; *Wilson v. Triumph Consolidated Min. Co.*, 19 Utah, 66, 75 Am. St. Rep. 718. See, too, *Omar v. Soper*, 11 Colo. 380, 7 Am. St. Rep. 246.

NELDEN v. CLARK.

[20 Utah, 382.]

STATUTES—IMPLIED REPEAL.—If an earlier statute is impliedly repealed by a later one on account of repugnancy or inconsistency between the two, the repeal is measured by the extent of the conflict between them; and if any part of the earlier act can stand as not superseded or affected by the later, that part is not repealed.

STATUTES—GENERAL AND SPECIAL CONSTRUCTION.—If there are two acts or provisions, one of which is special and particular, and certainly includes the matter in question, and the other general, which, if standing alone, would include the same matter, and thus conflict with the special act, the latter must be taken as intended to constitute an exception to the general act, especially when such general and special acts are contemporaneous.

STATUTES—IMPLIED REPEAL.—The repeal of a statute depends upon the intent of the legislature, express or implied, and if the legislature makes a change in a particular statute and enacts a new one upon the same subject, and it is apparent from the latter that it was the intention of the legislature to change the present provision in the old law and enact a new one to effectuate its purpose, it is a plain declaration that whatever is embraced in the new act shall prevail, and that whatever is changed or excluded is discarded from it. It is also clear evidence of the intent of the legislature to enact the provisions of the later act as the only ones on that subject which shall be obligatory.

MUNICIPAL CORPORATIONS.—POWERS OF CITY OFFICERS are limited strictly to those contained in the statutory grant, and when the power contained in such grant is limited or otherwise becomes nugatory or inoperative, all municipal rights thereunder cease, and all ordinances passed thereunder become inoperative, so far as they are affected by the change or repeal in the grant of power under which the ordinance was passed.

MUNICIPAL CORPORATIONS.—POWER OF OFFICERS.—If officers of a municipal corporation do an act in excess of their corporate authority, the corporation is not bound, and when the statute under which the corporation acts, or should act, especially restricts its action to a particular mode, or confers the power assumed upon others, none of the agents through whom the corporation acts can bind it in any manner other than that prescribed in the act granting the power.

MUNICIPAL CORPORATIONS.—INJUNCTION MAY ISSUE AGAINST CITY OFFICERS to restrain them from refusing to permit a board of public work to act in accordance with law in making city improvements.

W. C. Hall and C. B. Stewart, for the appellants.

Stephens & Smith, for the respondents.

³⁸⁵ **MINER, J.** This action was brought in April, 1899, to restrain the mayor and city council of Salt Lake City, the city engineer, ³⁸⁶ and superintendent of waterworks, under the order of the city council, from constructing about thirty thou-

sand dollars' worth of improvements to the city waterworks system, and also the construction of a bridge across the Jordan river at a cost of two thousand five hundred dollars.

Plaintiffs claim that under the law the board of public works were required to make contracts on behalf of the city for the performance of all such work, and the erection of the improvements described in the complaint and ordered by the city council, and that the city engineer and superintendent of waterworks, under the directions of the city council, had no right or authority to proceed with the construction of said work. The court decided the issues in favor of the plaintiffs, and found, among other things, that this right and duty devolved upon the board of public works, as ordered by the city council, and that the city council had no right or authority under the law to instruct the city engineer to proceed with the construction of the bridge by purchasing materials and employing labor by the day's work, and that the mayor and city council had no authority to direct the superintendent of waterworks to purchase material and construct the improvements to the waterworks system aforesaid, nor to employ labor by the day's work thereon, instead of letting contracts to the highest bidder.

Defendants appeal from the judgment, and claim that the findings of fact are contrary to law. In support of this contention appellants rely on subdivisions 36 and 76 of section 206 of the Revised Statutes of 1898, which were adopted prior to the year 1888, and which read as follows: "The city council shall have the following powers:

"36. To construct and keep in repair bridges, viaducts, and tunnels, and to regulate the use thereof."

"76. Waterworks, fire signals, etc. To purchase, construct, ³⁸⁷ lease, rent, manage, and maintain any system or part of any system of waterworks, hydrants, and supplies of water, telegraphic fire signals, or fire apparatus, and to pass all ordinances, penal or otherwise, that shall be necessary for the full protection, maintenance, management, and control of the property so leased, purchased, or constructed."

Prior to 1890, sections 1 and 2 of the Revised Ordinances of 1892, page 494, were adopted by the city council, providing that the waterworks shall be under the control of the city council, who may direct the construction of reservoirs, water-mains, water-tanks, service pipes, and fire hydrants that may be necessary; that the superintendent of waterworks shall, under the direction of the city council, have charge of the reser-

voirs, water-tanks, and machinery appurtenant to the water-works, and shall have the direction of the laying of water-mains and putting in service pipes, and the regulation of the water supply, etc.

Respondents rely upon an act creating a board of public works in cities of the first class, which took effect May 1, 1890, since the approval of section 206 of the Session Laws of 1890, page 62, being as amended sections 283, 286, chapter 13, of the Revised Statutes of 1898. These sections read as follows:

"283. Appointment—Term.—There shall be in each city of the first class a board of public works, which shall consist of five members, residents and freeholders of the city, appointed by the mayor, with the consent of the council, for the term of two years."

"286. Duties of Board.—It shall be the duty of such board of public works, and it shall have power, to make contracts on behalf of the city for the performance of all such work and the erection of all such improvements as may be ordered by the city council, but all such contracts shall be subject to the approval or rejection of the council; ~~and~~ to superintend the performance of all such work and the erection of such improvements, except the supervision of the construction of city halls, market-houses, jails, or other public buildings. It shall also be the duty of said board to approve the estimates of the city engineer which may be made from time to time of the value of the work as the same may progress; to accept any work done or improvement made, when the same shall be fully completed according to contract, subject, however, to the approval of the council; and to perform such other duties as may be devolved upon them by ordinance."

No express words of repeal are embraced in the act. If section 286 is repugnant to section 206, or so contradictory or irreconcilably in conflict with it that the two sections cannot be harmonized in order to effect the purposes of their enactment, then the latter act may repeal the former; but one act is not to repeal or defeat another if by reasonable construction the two can be harmonized and made to stand together. When a statute enumerates the persons and things to be affected by its provisions, there is an implied exclusion of others. "If two inconsistent acts are passed at different times, the last is to be obeyed, and if obedience cannot be observed without derogating from the first, it is the first that must give way." So if an earlier statute is impliedly repealed by a later one on account

of repugnancy or inconsistency between the two, the repeal will be measured by the extent of the conflict or inconsistency between the acts, and if any part of the earlier act can stand as not superseded or affected by the later, it will not be repealed by the later: *University of Utah v. Richards*, 20 Utah, 457, post, p. 928; *Black on Interpretation of Laws*, sec. 53; *State v. Grady*, 34 Conn. 118; *Wood v. United States*, 16 Pet. 343; *North Point etc. Irr. Cos. v. Utah etc. Canal Cos.*, 14 Utah, 162.

So, also, where the legislature grants the same power over a particular matter to two public bodies, one to a city and another to the trustees of a public canal, and the grants are repugnant, the last expressed will of the legislature will control: *Korah v. Ottawa*, 32 Ill. 121, 83 Am. Dec. 255.

In *Crane v. Reeder*, 22 Mich. 322, it is held that, "where there are two acts or provisions, one of which is special and particular and certainly includes the matter in question, and the other general, which, if standing alone, would include the same matter, and thus conflict with the special act or provision, the special must be taken as intended to constitute an exception to the general act or provision, especially when such general and special acts are contemporaneous, as the legislature are not presumed to have intended a conflict."

A repeal of a statute depends upon the intention of the legislature, express or implied. The fact that a later act is different from a former one is not sufficient to effect a repeal. It must appear in addition that the later act is contrary to or inconsistent with the previous act in order to justify the conclusion that the first is repealed. If the later act covers the subject matter of the former and makes different provisions which are contradictory and inconsistent with it, so that the two acts cannot stand together in harmony, then it may be said the one repeals the other in so far as it is inconsistent and contradictory.

With respect to this case, these statutes should be construed and considered according to what appears to have been the intention of the legislature. If the later law is clearly intended to prescribe the only rule which should ³⁹⁰ govern the particular case provided for, it should so far be construed as repealing the original act.

This rule does not rest alone on the ground of repeal by implication, but on the principle that when the legislature makes a change in a particular statute and enacts a new one

upon the same subject, and it is apparent from the act that it was the intention of the legislature to change the present provision in the old law and enact a new one to effectuate its purpose, it is a plain declaration that whatever is embraced in the new act should prevail, and that whatever is changed or excluded is discarded from it. It is clear evidence of the intention of the legislature to enact the provisions of the later act as the only ones on that subject that shall be obligatory: *Black on Interpretation of Laws*, 116, 118; *State v. Mayor etc.*, 40 N. J. L. 257; *University of Utah v. Richards*, 20 Utah, 457, post, p. 928.

Sections 36 and 76 are general provisions giving the control of bridges and waterworks to the city council; but it is clear that the legislature were not satisfied with those provisions of the statute as applied to cities of the first class, and therefore it enacted chapter 13, with sections 283 and 286, providing for the appointment of a board of public works by the mayor, with the consent of the city council, and empowering such board to make contracts for all works and the erection of all improvements as might be ordered by the city council, subject to the approval or rejection by the city council, and to superintend the performance of all such work and the erection of all such improvements, except the supervision and construction of city halls, market-houses, jails, and other public buildings.

It will be seen that this board is to be selected by the mayor, with the consent of the city council, and it is not authorized to make contracts on behalf of the city for the performance of work and erection of improvements, unless ³⁹¹ the work of improvements are ordered by the council. The contract when made by the board is subject to the approval or rejection of the city council. The board is authorized to make contracts on behalf of the city, and superintend the performance of such work and erection of improvements in all cases, except the supervision and construction of jails, city halls, market-houses, and other public buildings.

The delegation of power is special, to a specific board, and for the particular purpose named. By this act it is clear that the power conferred upon the board of public works was withheld and intended to be withheld and taken from the city council and conferred upon the board of public works. Sections 283 and 286 operate as a repeal of subdivisions 36 and 76 of the former act, and a withdrawal of like authority and power from the city council, in so far only as it may have been conferred by

section 206. Sections 283 and 286 make a different provision and confer upon a different board created by the act power to construct and contract for the construction of such improvements as may be made by the council. This provision is contradictory to, and inconsistent with, such powers as are conferred by section 206. By enacting chapter 13, making the change stated, the legislature undoubtedly intended to abrogate the power as well as to change the procedure contained in the said provisions of section 206, and confer the power given upon the newly constituted board. The enactment of the act is a plain declaration that whatever is embraced in the new act should prevail, and that whatever is changed or excluded from subdivisions 36 and 76 of section 206 is discarded from it, and that the provisions of the later act were intended to be the only ones upon that particular subject which would be obligatory and binding. The city council would still retain the powers conferred ^{and} by subdivisions 36 and 76 of section 206, that, as we have found, are not repealed, and which are not inconsistent with, or contradictory to, chapter 13, as explained.

It necessarily follows that sections 1 and 2 of the Revised Ordinances of Salt Lake City of 1892, page 494, so far as they are inconsistent with or contradictory to chapter 13, are inoperative and of no effect.

The powers of the city council are limited strictly to those contained in the statutory grant, and when the power contained in the grant is limited or otherwise becomes nugatory or inoperative, all municipal rights thereunder cease, and all ordinances passed thereunder become inoperative, so far as the same are affected by the change or appeal in the grant of power under which the ordinance was framed.

As a general rule, where officers of a corporation or a city council do an act in excess of their corporate authority, the corporation is not bound, and when the statute under which the corporation acts, or should act, especially restricts its action to a particular mode, or confers the power assumed upon others, none of the agents through whom the corporation acts can bind it in any manner or mode other than that prescribed in the act granting the power: *Dillon on Municipal Corporations*, 4th ed., secs. 89, 91, 449; *Brady v. Mayor etc.*, 16 How. Pr. 432; *Mayor etc. v. Porter*, 18 Md. 284, 79 Am. Dec. 686.

It does not appear from the record that the appellant interposed any demurrer to the complaint. It is therefore unnecessary to discuss that question raised in the brief.

In refusing to permit the board of public works to act in accordance with law, and in directing the superintendent of waterworks and city engineer to construct the improvements referred to in the complaint independent of said board of public works, the defendants were acting ³⁹³ without authority of law, and the injunction must be held to have been properly granted.

The findings of fact as entered were justified by the facts and the law, as we find it.

The judgment of the district court is affirmed, with costs.

Baskin, J., concurs.

BARTCH, C. J., concurring. I concur in the judgment, but not in that part of the opinion which holds that some of the provisions, without showing clearly which, of subdivisions 36 and 76 of section 206 of the Revised Statutes are contradictory to, inconsistent with, and repealed by chapter 13 of the Revised Statutes of 1898.

In my judgment the city council still has power to do all the things mentioned in those subdivisions, but some of them, which are specified in chapter 13, the council must perform through the agency provided for in that chapter, instead of through agencies of its own selection. In other words, some of the powers conferred in section 206, among which is the power to make contracts for the erection of improvements ordered by the council, must be exercised in the mode pointed out in chapter 13. Viewed thus, the several provisions of the statute can be read together, and each one be given effect, agreeably to the elementary principle of statutory construction that the various provisions of legislative enactments ought to be so construed, if possible, as to give effect to all. The provisions referred to are all parts of the Revised Statutes, and were all adopted and became effective at the same time.

STATUTES—IMPLIED REPEAL.—If a statute conflicts with a previously enacted statute, the latter is to that extent repealed or amended, whether expressly mentioned or not: *St. Louis etc. Ry. Co. v. Paul*, 64 Ark. 83, 62 Am. St. Rep. 154. However, a statute is not repealed by implication unless the later statute contains negative words, or an intention to repeal is made manifest by some intelligible form of expression: *State v. La Grave*, 23 Nev. 25, 62 Am. St. Rep. 764. See, too, *University of Utah v. Richards*, 20 Utah, 457, post, p. 928.

STATUTES—GENERAL AND SPECIAL PROVISIONS.—Special provisions in a statute relating to a particular subject matter must prevail over general provisions in other statutes in conflict there-

with: *State v. Cornell*, 53 Neb. 556, 68 Am. St. Rep. 629. See, also, *University of Utah v. Richards*, 20 Utah, 457, post, p. 928.

PUBLIC OFFICERS.—Where power is conferred upon public officers by legislative enactment, it can be exercised by them only in the way directed by the law, and unless the law granting the power is complied with strictly, the acts of the officers are void: *Mayor etc. v. Porter*, 18 Md. 284, 79 Am. Dec. 686. See, also, *Becker v. La Crosse*, 99 Wis. 414, 67 Am. St. Rep. 874.

MORRISON v. CLARK.

[20 Utah, 432.]

MECHANICS' LIENS—OWNER'S ACT OR ASSENT IS ESSENTIAL.—Under the Utah statute, land upon which a building is erected, or upon which materials are furnished, is not subject to a mechanic's lien unless the work is done, or materials furnished at the instance of the owner, or by some one acting by his authority or under him, as his agent, contractor, or otherwise.

MECHANICS' LIENS—LAND OF MARRIED WOMAN.—If a husband, without the consent and against the protests of his wife, and not acting as her agent, contracts for, and proceeds to erect, a dwelling-house on land owned by her, a materialman cannot acquire a lien on such land for materials furnished, although she occupies the premises with her husband, and has knowledge that the work is being done.

Bennett, Harkness, Howat, Bradley & Richards, for the appellant.

J. M. Bowman, for the respondents.

432 **MINER, J.** The question to be determined is, Was Morrison, Merrill & Co., under the findings of fact, entitled to a lien upon the premises, as against H. L. Clark, and, if not, did the court err in setting aside the conclusions of law as found by the referee and in making different conclusions of law and rendering a decree in favor of Morrison, Merrill & Co., subjecting the land of Hardie L. Clark to their lien for materials furnished under the contract entered into by contractor Smith and J. W. Clark?

Chapter 41, page 44, of the Session Laws of 1894, in force when this contract was made, provides, among other things, that the contractor, etc., shall have a lien for services rendered, labor or materials furnished, whether at the instance of the owner or of any other person acting by his authority or under him, as agent, contractor, or otherwise.

Under this statute the land upon which the building is ⁴³⁹ erected, or upon which materials are furnished, is not subject to a mechanic's lien unless the work was done or materials furnished at the instance of the owner, or by some one acting by the owner's authority, or under the owner as agent, contractor, or otherwise.

In *Culmer v. Wilson*, 13 Utah, 130, 57 Am. St. Rep. 713, it is held in substance that our statutes have relieved married women from common-law disability, and given them independent power to deal with, manage, control, transfer, dispose of, hold, and enjoy all their separate property, without limitation or restriction by reason of marriage to make contracts, contract property, to sue and be sued, defend and be defended, and in all respects places her in the same position with reference to her contracts, separate property and liability, on the same footing with other persons and as though she was unmarried.

In this case the facts found show that J. W. Clark, defendant's husband, contracted in writing for himself alone and on his own behalf to build the house on the lot in question, which in fact belonged to his wife, and that he was not the agent of his wife. It further appears that defendant Hardie L. Clark knew that J. W. Clark had made the written contract, lived on the land, and knew the work in constructing the house was going on; that she did not prevent the erection of the building, but never consented that her land should be liable on the contract for labor or material, or otherwise; that she disagreed with her husband about constructing the house on this lot, and wanted it erected on land in California, and objected and protested against the building of the house on her land, and that he built the house against her objection and over her protest, and she never consented thereto. During all this time and up to the completion of the house she believed, and he was in ⁴⁴⁰ fact, financially able to pay for the labor and materials so furnished. He was not her agent in any such matter, and had no right, title, or interest in the land on which the house was constructed. The contract was not made by her, or in her behalf, and she agreed to none of the terms, conditions, or agreements thereof.

In states having statutes providing that the wife's property may be subject to a lien for material furnished on a contract by the husband, the decisions hold the lien good on such contracts. So, where the husband makes such contract as the

agent of his wife, or she expressly ratifies his contract made, or where the wife fraudulently connives to conceal her ownership, and by acts and declarations fraudulently misleads the contractor into the belief that her husband owns the land on which he furnished material and labor, or so acts as to induce him to believe that although she owns the land she will become liable for the improvements that were being made, a lien has been declared, but the facts in this case do not present such a question.

J. W. Clark was not her agent. He had no authority whatever to bind the wife. While she knew of the contract, lived on the land, and did not prevent the erection of the building, she never consented to it, but on the contrary objected to it, protested against it, and never in any way gave her consent to it. She concealed nothing and consented to nothing that was done, but objected to everything that was done. She believed her husband to be, and he was in fact, able to pay for what he contracted. Under such circumstances no power resides in the husband, as such, to bind the land of his wife. Her estate cannot be made liable for improvements she did not authorize and to which she protested and objected. The fact that the wife occupied the premises with her husband ⁴⁴¹ and knew the work was going on does not change the rule under the facts found. If the husband could be allowed to encumber the estate of his wife against her will and protest, such rights in her separate property granted to her by law would be of little value, and the husband could readily, in this manner, contract her estate away, and bring her to financial ruin. Under these circumstances to allow the lien and thus permit her to be stripped of the title to her estate, and possibly deprive her of a shelter for herself and family, would be contrary to equity and subversive to that provision which the law intended should be thrown around her separate estate.

Many authorities are cited by the respondent upon this question, but an examination of them shows that in nearly every case the question decided turned either upon a statute authorizing the husband to make the contract, or upon the husband's agency, or the wife's consent or ratification of the contract, with full knowledge thereof. In this case the facts found are not broad enough to implicate the wife, so as to bring her within the rule contended for by respondent.

In *Wadsworth v. Hodge*, 88 Ala. 500, it is held that: "The contract must be either originally that of the wife, through

herself, or her authorized agent; or else the husband, or other agent, must assume to contract for her and in her own behalf, and such contract be subsequently ratified by her, with full notice or knowledge of its nature. In the absence of a contract of this character, no lien will attach to her property. And where the credit is given solely to the husband, he alone is bound, although it may appear that the wife knew that the building or improvements were in process of erection on her land, and said nothing, or that she and other members of the family afterward occupied the building as a dwelling. This ⁴⁴² view is not only consonant with reason and justice, but is also everywhere supported by the authorities": Phillips on Mechanics' Liens, 3d ed., secs. 101, 102; Dearie v. Martin, 78 Pa. St. 55; Wendt v. Martin, 89 Ill. 139; Corning v. Fowler, 24 Iowa, 584; Miller v. Hollingsworth, 33 Iowa, 224; Warren v. Smith, 44 Tex. 247; Washburn v. Burns, 34 N. J. L. 18; Boisot on Mechanics' Liens, sec. 276.

There are several other questions discussed in the brief of appellant, but we refrain from considering them, as the matter discussed disposes of the case.

We conclude that the findings of fact do not warrant or justify the conclusions of law, judgment, and decree found and made by the court as against appellant Hardie L. Clark, or justify any finding or decree that Morrison, Merrill & Co. had a right to any lien upon the property of Hardie L. Clark.

The judgment is reversed, and the case remanded with instructions to set aside the findings of fact and decree made by the court as against appellant, and to dismiss the cross-complaint of Morrison, Merrill & Co. as against appellant Hardie L. Clark, with costs.

Bartch, C. J., and Baskin, J., concur.

A MECHANIC'S LIEN CANNOT BE ENFORCED when the contract under which it arises is made with another than the ostensible owner of the property at the time, and without his consent or authority: Galbreath v. Davidson, 25 Ark. 490, 99 Am. Dec. 233. See, too, Paulsen v. Mamske, 126 Ill. 72, 9 Am. St. Rep. 532, and note.

MECHANIC'S LIEN—MARRIED WOMAN.—If a building is erected on a wife's land at the sole request of the husband, a mechanic's lien will not attach to her estate in the land, although she knew of and did not object to the erection during its progress: Flannery v. Rohrmayer, 46 Conn. 558, 33 Am. Rep. 36; Lauer v. Bandow, 43 Wis. 556, 28 Am. Rep. 571. See, further, Santa Cruz etc. Co. v. Lyons, 117 Cal. 212, 59 Am. St. Rep. 174; Bastrup v. Prendergast, 179 Ill. 553, 70 Am. St. Rep. 128.

UNIVERSITY OF UTAH v. RICHARDS.

[20 Utah, 457.]

STATUTES.—IMPLIED REPEAL of statutes is not favored by law, but if an earlier and later statute are repugnant to each other, or are so irreconcilably in conflict that they cannot be harmonized to effectuate the purpose of their enactment, the later act, by implication, repeals the other.

STATUTES—CONFLICT—CONSTRUCTION.—One statute is not allowed to repeal another by implication if, by reasonable construction, the two can stand together.

STATUTES—CONSTRUCTION—CONFLICT.—Particular provisions in a statute relating to a former subject must govern in relation to that subject, as against general provisions in another part of the law which otherwise might be broad enough to cover it.

STATUTES—CONSTRUCTION.—If a statute enumerates the persons and things to be affected by its provisions, there is an implied exclusion of others, and the inference follows that it is not intended to be general.

STATUTES—CONFLICT—CONSTRUCTION.—If one statute is specific, temporary, and special, and covers a definite, special subject, and another statute is general, and has no relation to the same subject or purpose, and is continuous in its operation, the two statutes are not repugnant to each other, may be easily harmonized, and one does not repeal the other by implication.

STATUTES—CONSTRUCTION.—One statute is not repugnant to another unless they both relate to the same subject and are enacted for the same purpose. If there is a difference in the whole purview of the two statutes, apparently relating to the same subject, one does not repeal the other.

STATUTES — CONFLICT — CONSTRUCTION. — If there are two statutes, or two provisions of the same act, one of which is special and particular and certainly includes the matter in question, and the other general, which, if standing alone, would include the same matter, and thus conflict with the special provision, the special act must be taken as intended to constitute an exception to the general act or provision, especially when both acts are contemporaneous, or passed at the same legislative session.

STATUTES — CONFLICT — IMPLIED REPEAL. — If, by fair and reasonable interpretation, acts which are seemingly contradictory may be enforced and made operative and harmonious, without obscurity or conflict, both must be upheld, and the later is not regarded as repealing the former by construction or intentment. Hence a later act covering part or all of the provisions of an earlier act does not necessarily repeal the latter.

STATUTES—CONSTRUCTION.—A clause in a statute providing that "all laws in conflict herewith shall not be construed to prevent the carrying out of the provisions of this act" is a declaration on the part of the legislature that such statute is enacted for a special, particular, and temporary purpose, and that it shall be enforced according to its terms without regard to any other law in force.

A. C. Bishop, attorney general, for the appellant.

Williams, Van Cott & Sutherland and Pierce, Critchlow & Barrette, for the respondents.

⁴⁶¹ MINER, J. This is an action brought to obtain a writ of mandamus against the state auditor, requiring him to issue a warrant for five thousand dollars, to be expended by the plaintiff, through its regents, under the provisions of chapter 5 of the Session Laws of 1899, the defendant having refused on application to draw a warrant for such sum on the ground that chapter 53 of the Session Laws of 1899 supersedes and is repugnant to chapter 5, and that the plaintiff had not complied therewith. We are required to place a construction or interpretation on these two provisions of the statute.

The legislature of this state, at its session in 1899, enacted chapter 5, page 20, which, among other things, provides for the removal of the University of Utah and its establishment on the site granted by Congress. By the first section of the act the regents of the university are authorized and directed to expend two hundred thousand dollars, or so much thereof as may be necessary to plat the grounds, procure plans, erect necessary buildings, equip and furnish the same, and do all other acts and things necessary to establish and construct said university. Section 7 of this act reads as follows:

"Appropriation.—There is hereby appropriated one hundred thousand dollars, or so much thereof as may be necessary, to effectuate the purposes mentioned in section 1 of this act; not to exceed fifty thousand dollars thereof may be drawn by the regents of the University of Utah at such times as they may deem proper during or after the year 1899; and not to exceed fifty thousand dollars may be drawn by the regents of the University of Utah at such times as they may deem proper during or after the year 1900; and the state treasurer and the state auditor are hereby authorized and directed to issue and pay warrants ⁴⁶² for such one hundred thousand dollars as herein specified."

This act was approved and took effect on the twenty-fourth day of February, 1899.

Subsequently, at the same session, the legislature enacted chapter 53, page 76, of the Session Laws of Utah of 1899. The object of this act is expressed in the title, being to amend section 2070 of the Revised Statutes of 1898, in relation to state institutions drawing their biennial appropriations, and reads as follows:

"Be it enacted by the legislature of the state of Utah:

"Sec. 1. That section 2070 of the Revised Statutes of Utah, 1898, be amended to read as follows:

"Sec. 2070. Appropriations—When Available—How Drawn. That on the first day of each month, or as soon thereafter as the bills for the expenses for the previous month have been audited, the board of control of each state institution, or the proper committee thereof, duly authorized by the board for such purpose, shall make a requisition upon the state auditor for a warrant in sufficient amount to pay the bills so audited, and thereupon the state auditor shall draw his warrant against the appropriation made for such institution for the amount named in the requisition in favor of the treasurer of the governing board of the institution, or in case of the state prison in favor of the warden thereof. To obtain such warrant the treasurer of the board or the warden must present to the state auditor a written authorization from the board."

This act took effect on its approval March 9, 1899.

The appellant contends that this last act repeals or is repugnant to that part of section 7, chapter 5, as provides that the regents may draw not to exceed fifty thousand dollars, or such part thereof as may be necessary, during or after the year 1899, and not to exceed fifty thousand dollars during or after the year 1900, and therefore claims that so much of said sum found necessary should be drawn under chapter 53, and that ⁴⁰⁸ requisition for the same should be made at the beginning of each month sufficient to pay bills audited for the previous months.

The law-makers did not see fit to embrace in the latter any express words of repeal of the former act. If such former act is repealed, it must be by implication. If the acts are repugnant or are so irreconcilably in conflict with each other and cannot be harmonized together, in order to effectuate the purpose of their enactment, then it may be said the later act may by implication repeal the former. Repeals by implication, however, are not favored by the law. One act is not to be allowed to defeat another if, by reasonable construction, the two can be made to stand together. Particular provisions relating to a former subject must govern in relation to that subject as against general provisions in another part of the law which might otherwise be broad enough to include it.

Where a statute enumerates the persons and things to be affected by its provisions, there is an implied exclusion of others, and the natural inference follows that it is not intended to be

general: North Point etc. Irr. Co. v. Utah etc. Canal Cos., 14 Utah, 163. So, as said in Sutherland on Statutory Construction, 157, 158: "It is a principle that a general statute without negative words will not repeal by implication from their repugnancy the provisions of a former one which is special or local, unless there is something in the general law or in the course of legislation upon its subject matter that makes it manifest that the legislature contemplated and intended a repeal. When the legislator frames a statute in general terms, or treats a subject in a general manner, it is not reasonable to suppose that he intends to abrogate particular legislation to the details of which he had previously given his attention, applicable only to a part of the same subject,"⁴⁰⁴ unless the general act shows a plain intention to do so": Ex parte Crow Dog, 109 U. S. 570; Sedgwick on Statutory and Constitutional Law, 97; Malloy v. Commonwealth, 115 Pa. St. 25; 23 Am. & Eng. Ency. of Law, 424, 425; Sutherland on Statutory Construction, sec. 147.

The university act had special reference to the removal of the University of Utah and its establishment on the site granted by Congress, and to plat the grounds, procure plans, erect necessary buildings thereon, and to equip and furnish the same as a state university, and the sum of two hundred thousand dollars was appropriated for that purpose, to be drawn at such times as the regents thought proper, not to exceed fifty thousand dollars to be drawn during or after the year 1899, and a like sum during or after 1900. The regents are directed by the act to expend the sum appropriated, or so much thereof as is necessary for this purpose. It was doubtless within the contemplation of the legislature that contracts could be made to better advantage and material and labor procured at a greater saving to the state when cash could be paid at the maturity of the obligations entered into by the regents.

By requiring the regents to comply with the law and to draw the money at such times as they may deem proper, the legislature intended to vest in such board a large discretion as to the amount of money to be drawn and when it should be drawn, in order to meet the various expenses and obligations that they were required to incur. The appropriation was made for a special, temporary, and specific purpose. The plan was to be carried out in a special way, by a special board; when the object was accomplished, the improvements made, and the appropriation exhausted, the act so far ceased to be operative.

The act applies to no other board, building, or fund. Nor are the payments to be made biennially. At the end of ⁴⁰⁵ the act, as if to emphasize the purpose and object of it and render it operative as against any other provision of the statute, the legislature made a provision that: "All laws in conflict herewith shall not be construed to prevent the carrying out of the provisions of this act."

Chapter 53, enacted a few days later, amended section 2070 of the Revised Statutes in relation to state institutions drawing their biennial appropriations, and provided that on the first of each month, or as soon thereafter as bills for expenses for the previous month have been audited, the board of each state institution may make requisition for warrants to pay the bills so audited, etc. Before this amendment a proper pro rata of the biennial appropriation to state institutions was drawn quarterly in advance. By the old method of drawing this fund under section 2070, large amounts of money could be drawn from the state treasury in advance so as to deplete it for a time, while the money drawn might lay idle in banks and thus cause the state some financial embarrassment. This may have been the fault sought to be remedied by the enactment.

All state institutions have their regular expenses accruing at regular intervals. The biennial appropriations are supposed to be sufficient to cover these expenses, and the provision was probably made so that such bills could be met monthly, after they were audited, and thereby preserve the remaining fund in the hands of the state treasurer, thus subserving all legitimate purposes.

In construing a statute the amendment thereto should be read in connection with the section amended. Endlich on Interpretation of Statutes, section 294, says: "No doubt, a statute which is amended is thereafter, and to all acts subsequently done, to be construed as if the amendments had always been there, and the amendment itself so thoroughly becomes a part of the original statute ⁴⁰⁶ that it must be construed in view of the original statute as it stands after the amendments are introduced and the matters superseded by the amendments eliminated."

Had section 2070 originally read as it is amended, it would not reasonably be contended that the enactment of section 7 of chapter 5 repealed it, as they do not apply to the same subject matter. Chapter 5 deals with a special appropriation for a special temporary, definite purpose, such as the construction

of buildings for an expensive state university, and the laying out of grounds, which, when completed, ends the object of the statute. Chapter 53 deals with a general subject concerning monthly distributions of biennial appropriations covering the expenditures of all public institutions in the state. One is specific, temporary, and special, covering a definite, special subject, and having a special, temporary object and duration; the other being a general act having no relation to the same subject or purpose, and being continuous in its operation. The two provisions have no repugnancy to each other, and are readily harmonized.

On this subject Sutherland on Statutory Construction, section 138, says: "One statute is not repugnant to another unless they relate to the same subject and are enacted for the same purpose. When there is a difference in the whole purview of two statutes apparently relating to the same subject, the former is not repealed."

In the case of *Crane v. Reeder*, 22 Mich. 322, it is said: "Where there are two acts or provisions, one of which is special and particular, and certainly includes the matter in question, and the other general, which if standing alone would include the same matter, and thus conflict with the special act or provision, the special must be taken as ⁴⁶⁷ intended to constitute an exception to the general act, or provision, especially when such general and special acts are contemporaneous, as the legislature are not presumed to have intended a conflict": Black on Interpretation of Laws, 116.

It is also contended that the later act passed at the same session repeals the previous one, but this does not necessarily follow. The repeal depends upon the intention of the legislative body as expressed in the act. The fact that the later act is different from the former one is not sufficient; it must further appear that the later act is contrary or inconsistent with the former in order to justify the contention that the first is repealed. If the later act covers part or all of the provisions of the former, it may not effect a repeal, for it may then be merely affirmative or auxiliary to the former. The rule is that if, by fair and reasonable interpretation, acts which are seemingly contradictory may be enforced and made operative and harmonious, without obscurity or conflict, both will be upheld, and the later will not be regarded as repealing the former by construction or intendment.

In Sutherland on Statutory Construction, sections 152, 153, it is said: "The presumption is stronger against implied repeals where provisions supposed to conflict are in the same act or were passed at nearly the same time. In the first case, it would manifestly be an inadvertence, for it is not supposable that the legislature would deliberately pass an act with conflicting intentions; in the other case, the presumption rests on the improbability of a change of intention, or, if such change has occurred, that the legislature would express it in a different act without an express repeal of the first."

This authority has a pertinent bearing, as also does section 147 of the same work, inasmuch as no express ⁴⁶⁸ words of repeal are found in the later enactment; while in the former act, passed at the same session, there is contained a clause which provides that "all laws in conflict herewith shall not be construed to prevent the carrying out of the provisions of this act."

This clause is unusual, and was evidently inserted for a purpose. It does not in words repeal any other law, but affects the construction of all laws in conflict and disarms them from any repealing effect upon the act. It is seemingly a declaration on the part of the legislature that the act was enacted for a special, particular, and temporary purpose, and that it should be enforced according to its terms without regard to any other law in force.

We hold it was the exclusive province of the legislature to decide how, when, and by whom money should be drawn by the regents of the University of Utah under the provisions of chapter 5. A discretion was intended to be vested in the board of regents, and we are satisfied that in so far as they have gone they have not exceeded their authority, but were acting within the clear provisions of the statute in making the demand and requisition in question.

The judgment of the district court in overruling the demurrer and in directing a peremptory writ of mandate to issue, as prayed, is affirmed.

Let the writ issue accordingly.

Bartch, C. J., and Baskin, J., concur.

STATUTES.—A SPECIAL PROVISION in a statute relating to a specific subject matter controls general provisions therein: *Richards v. Commissioners of Clay County*, 40 Neb. 45, 42 Am. St. Rep. 650. And if there are two acts, one of which is special and includes the matter in question, and the other general, which, standing alone, would include the same matter, the special act must be taken as

intended to constitute an exception to the general act, especially when the two are contemporaneous: *Nelden v. Clark*, 20 Utah, 382, ante, p. 917.

STATUTES.—AN IMPLIED REPEAL of a statute is not favored, and does not exist unless there is a positive repugnancy between the provisions of the new law and those of the old: Note to *State v. La Grave*, 62 Am. St. Rep. 768. See, too, *Nelden v. Clark*, 20 Utah, 382, ante, p. 917. The legislature is not presumed to intend to interfere with a former statute relating to the same subject matter, unless the repugnancy between the two is irreconcilable: *State v. La Grave*, 23 Nev. 25, 62 Am. St. Rep. 764.

STATUTES.—GENERAL WORDS in a statute following an enumeration of particular cases apply to cases of the same kind and description. A statute enumerating things inferior cannot, by general words, be construed so as to extend to and embrace those which are superior: *Ambler v. Whipple*, 139 Ill. 811, 82 Am. St. Rep. 202.

INDEX TO THE NOTES.

- ALIMONY AND MAINTENANCE**, abandonment of wife as a ground for, 234.
ability of husband to pay is a prerequisite to the allowance of, 245.
adultery of husband as a ground for, 237.
allowance to wife, what sufficient to bar action for, 243.
amount of, should be determined from all husband's circumstances, 245.
apprehension of ill-treatment by husband, when justifies granting of, 236.
chancery courts, extent to which could award in suits for wife's protection, 229.
could be awarded by the ecclesiastical courts only in suits for divorce, 228.
cruelty of husband justifies granting of, 235.
defense, what deemed sufficient to authorize granting of, 235.
defense, misconduct of wife which will bar her right to, 243.
defense that the wife is living separate from her husband by her own fault, 242.
delay in bringing suit cannot bar right of, 244.
desertion of wife as a ground for, 234.
divorce, decree of where the court had no jurisdiction of the person of the wife does not bar her right to, 241, 242.
divorce, exceptions to the rule that alimony may not be awarded after, 241.
divorce from bed and board does not terminate power of courts to award, 241.
divorce of husband and wife terminates power of court to award, 240, 241.
fault of the wife as a defense to her suit for, 239.
husband may, in California, maintain suit against his wife for, 240.
income of wife as a defense to suit for, 244.
insults and other mistreatment not amounting to cruelty, whether justify granting of, 236.
living apart of husband and wife, what sufficient to authorize granting of, 234, 235.
misconduct of wife sufficient to bar her right to, 243.
offer to return to and support a wife, when terminates her right to receive, 243.
power to award, whether depends on statutory authority, 238.

ALIMONY AND MAINTENANCE, separate maintenance, independent suits for, 229.

separate suits for, American decisions sustaining though no statute authorizes, 230, 231.

separate suits for, cannot be sustained unless authorized by statute, 229, 230.

separate suits for, may be maintained when the wife has a just cause for living apart from her husband, 232.

separation from husband without wife's fault justifies the granting of, 234.

statutes authorizing award of, though there is no suit for divorce, 239.

supplicavit, right of allowance of in proceedings under, 229, 230.

temporary, items which may be included in the allowance of, 244, 245.

threats sufficient to authorize granting of, 235, 236.

whether may be awarded to a wife who has no grounds for divorce, 238.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS, effect of, on property in other states, 148.**ATTACHMENT**, death of defendant, effect of upon, 785.**ATTORNEYS AT LAW**, wills, competency of to testify respecting, 461, 462.**BANKS**, collection of commercial paper by agents selected by, when not answerable for the negligence of, 625, 626.

collection of commercial paper by, authority for, does not warrant a sale of, 615.

collection of commercial paper by, authority for, need not be expressed in the charter, 613.

collection of commercial paper by, credit given to customers for, is provisional only, 627.

collection of commercial paper by, demand for payment of, liability for negligence respecting, 618, 619.

collection of commercial paper by, diligence which must be exercised in, 615, 616.

collection of commercial paper by, dishonor, duty of, to give notice of, 620, 621.

collection of commercial paper by, duty of, to demand, protest and give notice of dishonor, 615, 620.

collection of commercial paper by, general rule respecting duties of, 615.

collection of commercial paper by, imposes on them the duties of agents of their customers, 613.

collection of commercial paper by, instructions given, duty of to follow, 627.

collection of commercial paper by, is a part of the regular business of, 613.

BANKS, collection of commercial paper by, liability of, for agents selected for in distant places, 623.

collection of commercial paper by, liability of, for negligence of notaries employed by, 616, 626, 627.

collection of commercial paper by, liability of, for sending paper to the payer, 624.

collection of commercial paper by, liability of when undertaking, 614.

collection of commercial paper by, negligence of, in making improper or insufficient presentment for demand or acceptance, 617, 618.

collection of commercial paper by, negligence of, in not presenting for payment or acceptance, 616, 617.

collection of commercial paper by, no authority created by merely making the paper payable to, 614.

collection of commercial paper by, notaries selected by, liability for their acts and neglects, 616, 626, 627.

collection of commercial paper by, notice of nonpayment or non-acceptance, when and to whom must be given, 621, 622.

collection of commercial paper by, payment of, in what may be received, 628, 629.

collection of commercial paper by, presentment of, for payment or acceptance, diligence which must be exercised in, 616.

collection of commercial paper by, protesting to fix liability, 619.

collection of commercial paper by, relation of, to depositor of commercial paper for collection, 614.

collection of commercial paper by, suits in aid of, need not be brought without instructions, 628.

collection of commercial paper by, title of, to commercial paper deposited with for collection, 614, 615.

collection of commercial paper by, title to paper does not vest in, 614.

collection of commercial paper by, transmission of the paper to a distant place, 623.

collection of commercial paper by, usages respecting, 628.

BILLS OF LADING, parol evidence to vary, 377.

CHILDREN, negligence, contributory, when cannot be charged to, 191.

COMMON CARRIERS, human life, diligence required of, when it is involved, 26.

vehicle, duty of, to provide safe and sufficient, 27, 28.

CONFLICT OF LAWS, assignments for the benefit of creditors valid where made are generally valid elsewhere, 148.

negligence occurring in one state and producing personal injury in another, 87.

CONSTITUTIONAL LAW, eight-hour law, when unconstitutional, 800.

CREDITORS OF HUSBAND, profits of business conducted in the name of his wife, when may be reached by his creditors, 106-108.

when may reach improvements placed by him on lands of his wife, 93, 94.

wife, when may be compelled to account to her husband's creditors for his services, 93-108.

DAMAGES for fright and injuries resulting therefrom, 859-873.

DEFINITION of mental agony, 859.

DILIGENCE REQUIRED WHEN HUMAN LIFE IS INVOLVED,

carriers of passengers, rules applicable to, 28.

electricity, care required in management of, 29.

expense must not be spared, 28.

explosives, care required in management of, 29, 30.

includes the doing of everything which gives reasonable promise of the preservation of life, 26, 27.

general applicability of rules concerning, 30.

passenger elevators, care required of owners of, 23.

street-car corporations, rules applicable to, 28.

trespassers, rules applicable to, 28.

DIVORCE, alimony, when may be allowed after granting of, 240, 241.

alimony, when may be allowed without bringing suit for, 230-233.

ELECTIONS, ballots, marks on, which must not be regarded as distinguishing, 306.

ESTOPPEL of municipal corporation to claim lands adversely held, 539.

of wife as against creditors of her husband to claim her separate property, 108.

EXECUTION SALES, notice of, absence of or defects in, 410.

notice of, when sufficient, 410.

FRIGHT at being put off a railway train at night or in a place of danger, 865, 870.

damages caused by attempt to escape, 862.

damages for, cannot be recovered unless connected with the wrongful act of the defendant, 861, 869.

damages for, cannot be recovered where there is no other injury, 860.

damages for, cases sustaining recovery of, 867, 868.

damages for mental anxiety resulting from, 871, 872.

damages for physical injuries resulting from, 862.

FRIGHT, damages for, when accompanied by contemporaneous injuries, 860.

damages for, when accompanied by personal injuries, 860, 861.

damages for, where it results in impairment of health, 871.

fear of injury to another, 871.

injuries, what deemed to be attributable to, 865.

proximate results of, what are not, 863.

resulting from injuries done to property, 872, 873.

resulting from negligent act, 870.

GARNISHMENT, judgment in, as a defense to an action on the principal debt, 543, 544.

judgment in, effect of upon actions in another state, 545.

judgment in, is prima facie a satisfaction of the principal debt, 543.

judgment in, not paid, does not satisfy the principal debt, 544.

judgment in, payment of, satisfies the principal debt, 542, 544.

judgment in, whether satisfies the principal debt, 542, 544.

GIFTS by husband to wife, when may be assailed by his creditors, 97, 98, 108.

HOMESTEADS are subject to pre-existing equities, 806.

are subject to pre-existing mortgages, 806.

description, erroneous in conveyances and mortgages may be corrected in equity, 804, 805.

reformation of a conveyance or mortgage upon, 804.

reformation of conveyance not executed by both husband and wife will not be decreed, 805.

reformation of conveyance, right to, whether may be taken away by a subsequent dedication, 806.

HUSBAND AND WIFE, agent of wife, husband may act as, 100, 101, 104.

agreements for separation, 764.

community property, use of, in improving wife's lands, 97.

conveyances by him to her in payment of his debts, 105, 106.

creditors of husband, when may compel wife to pay for his personal services, 97, 98, 101.

creditors of husband, when may reach improvements placed by him on his wife's lands, 93, 94.

crops raised by husband on his wife's lands, 98, 99.

devices between which are deemed in fraud of his creditors, 102, 103.

exempt property, adding of to wife's lands, 93.

equity, power of, to compel wife to account for the value of her husband's services on her property, 105-107.

estoppel of wife, as against creditors of her husband, to urge her claim to separate property, 108.

HUSBAND AND WIFE, execution against her property for his debts, 96.

fraud, participation in by wife, when subjects her property to claims of husband's creditors, 95, 96.

gift by him to her, improvements, placing on her land, when not deemed to be, 93, 94.

gift by him to her, when unlawful as against creditors, 92.

gift from her to him, when presumed, 108.

gift of his personal services and skill by a husband in acquiring or improving wife's property, 97, 98.

gift to wife of the proceeds of her own labor, 100.

improvement of wife's land by her husband's personal services, whether his creditors may complain of, 98.

improvements placed on her lands by an insolvent husband, 93.

improvements placed on her lands by her husband, when cannot be followed by his creditors, 93, 94.

improvements placed on her lands in payment of husband's indebtedness to her, 93.

increase of wife's estate through the management of her husband, 100, 101, 104, 105, 106.

increased value of her property caused by his acts or moneys, 92.

intent of wife, effect of in rendering transfer fraudulent, 95.

labor of husband in improving wife's property, 97, 98.

personal services of husband on wife's lands create no implied obligation against her, 98, 99.

profits of wife's business managed by husband, when and to what extent his creditors may reach, 106-108.

INSURANCE, life, assignment of to creditor, extent to which is enforceable, 361.

life, liquors, waiver of conditions against use of, 422.

statute of frauds, contract of, is not within, 432.

LIBEL of candidates for public office, publication of, beyond the district affected, 564.**LIQUORS, keeping of, in one's possession cannot be prohibited by statute, 392.****MORTGAGE, debt partly due, sale of whole property, when will be ordered, 908.**

equitable, when arises, 195.

MUNICIPAL CORPORATIONS, pollution of streams by, when may be enjoined, 344.**NEGLIGENCE, concurrent liability for, 87.**

fright resulting from, recovery of damages for, 870, 871.

of banks in the collection of commercial paper deposited with them, 614-629.

NEGOTIABLE INSTRUMENTS, banks acting as collection agencies of, 614-629.

blank, execution of in, 606.

NOTARIES, liability of banks employing for their negligence respecting commercial paper, 616, 626, 627.

NUISANCE, jail, erection of, will not be enjoined as, 367.

PARTNERSHIP, agreement not to dissolve is ineffective and its breach merely gives rise to an action for damages, 319.
indissoluble, cannot exist, 319.

PARTNERSHIP FOR A DEFINITE PERIOD, dissolution of, by courts of equity, 321.

dissolution of, may be effected by any partner, 319.

voluntary assignment of any partner terminates, 320.

withdrawal of partner notwithstanding his agreement for, 320.

PASSENGER ELEVATORS, care required in the use and management of, 28.

RAILWAY CORPORATIONS, freight, liability for negligently or wrongfully causing, 865, 870.

night-time, rapid running of trains in, whether negligence, 54, 55.

speed of trains in night-time, 55, 56.

REFORMATION of conveyances and of encumbrances against homesteads, 804-806.

SALES, consignee having indicia of ownership, sales by, when valid as against the owner, 331-334.

STATUTES, implied repeal of, 935.

STREET RAILWAY CORPORATIONS, diligence required of when human life is endangered, 28.

SURETYSHIP for honesty of an agent whom the principal knows to be dishonest, 660.

USAGES of banks respecting the collection of commercial paper, 628.

WILLS, attestation by subscribing witnesses, mode of, 459.

interlineations and erasures in, 646.

lost or destroyed, proof of, 741.

revocation by mutilation, when presumed, 646.

witnesses, subscribing by, must be as directed by statute, 459.

witnesses, subscribing, competency of, at the time of the attestation cannot be removed by subsequent events, 465.

witnesses, subscribing, competency of attorneys of testator to testify respecting, 461.

witnesses, subscribing, competency of, definition of, 460, 462.

witnesses, subscribing, competency of executors as, 466.

- WILLS, witnesses, subscribing, competency of husband or wife as,** 468.
- witnesses, subscribing, competency of legatees as,** 467.
- witnesses, subscribing, competency of, must be determined by the facts existing at the time of the attestation,** 459, 465.
- witnesses, subscribing, competency of persons other than subscribing witnesses,** 469, 470.
- witnesses, subscribing, competency of, persons subscribing by their mark,** 461.
- witnesses, subscribing, competency of, presumption of,** 460.
- witnesses, subscribing, competency of, to testify though they do not recollect the subscribing,** 462.
- witnesses, subscribing, competency of, when interested under,** 463, 464.
- witnesses, subscribing, competent, persons under fourteen years of age are presumed not to be,** 460.
- witnesses, subscribing, competent, persons who do not understand the language are not,** 460.
- witnesses, subscribing, competent, women are not in Louisiana,** 460.
- witnesses, subscribing, conclusiveness of testimony of,** 476, 478.
- witnesses, subscribing, "credible" means competent,** 460.
- witnesses, subscribing, credibility of, circumstances affecting,** 479.
- witnesses, subscribing, death or other incompetency of after signing,** 459.
- witnesses, subscribing, devisees, whether competent as,** 462, 463.
- witnesses, subscribing, disinterested, illustrations of,** 464, 465.
- witnesses, subscribing, disinterested who are,** 462, 463.
- witnesses subscribing, evidence of one only may be sufficient,** 470, 471.
- witnesses, subscribing, duties of,** 473.
- witnesses, subscribing, evidence of one who appears to be but was not,** 477.
- witnesses, subscribing, evidence, when restricted to,** 474.
- witnesses, subscribing, failure of memory on the part of,** 474, 475.
- witnesses, subscribing, failure of some of them to testify to the necessary formalities,** 472, 474.
- witnesses, subscribing, execution of will may be established by their evidence,** 472.
- witnesses, subscribing, heirs of the testator may be,** 462.
- witnesses, subscribing, incompetency of at the time of the attestation cannot be removed by subsequent events,** 465.
- witnesses, subscribing, interest, indirect or consequential, does not disqualify,** 464, 465.
- witnesses, subscribing, interest which will disqualify,** 462.
- witnesses, subscribing, interest which will not disqualify,** 464.

WILLS, witnesses, subscribing, may deny the sanity of the testator, 478.

witnesses, subscribing, must be able to identify the will, 478.

witnesses, subscribing, qualifications of, none were prescribed by the common law, 463.

witnesses, subscribing, production of, when essential, 479, 480.

witnesses, subscribing, proof of will need not be made by, 469, 473.

witnesses subscribing, sanity or insanity, conclusiveness of testimony respecting, 478.

witnesses, subscribing, signing of name to by incompetent person, 459.

witnesses, subscribing, testimony of against the will is not conclusive, 472.

witnesses, subscribing, testimony of one in opposition to the others, 473.

witnesses, subscribing, weight to be given to testimony of respecting the sanity of the testator, 478, 479.

witnesses, subscribing, where their husbands or wives are interested under the will, 468, 469.

witnesses, subscribing, whether all must be called and examined, 470.

witnesses, subscribing, who are out of the state need not be called, 470.

witnesses to prove lost or destroyed, 471.

WITNESSES to wills, competency of, 460-470.

to wills, credible, who are, 460, 479.

to wills, disinterested, who are, 464, 465.

to wills, duties of, 473.

to wills, evidence of, when conclusive, 476, 478.

to wills, interest which will not disqualify, 464.

to wills, production of, when essential, 479, 480.

to wills, sanity of testator, weight to be given testimony of respecting, 478, 479.

Am. St. Rep. Vol. LXXVII.—60

INDEX.

ACKNOWLEDGMENTS.

See Adoption, 1; Homestead, 2.

ACTIONS.

ACTION—ELECTION TO SUE IN CONTRACT OR TORT.—

Where a duty is imposed by law, by reason of the relations of the parties, although the relation was created by contract, a neglect to perform this duty gives the injured party a right of action, and he may elect to sue upon the contract, or treat the wrong as a tort, and bring an action *ex delicto*. (Kansas City etc. R. R. Co. v. Becker, 78.)

See Jurisdiction; State.

ADOPTION.

1. ADOPTION—ACKNOWLEDGMENT OF ARTICLES.—An acknowledgment of an instrument adopting a child, required to be made like that of a deed to real estate, may be taken by a deputy clerk of court under a statute giving him authority to take acknowledgments of instruments in writing, although another statute provides for the acknowledgment of conveyances of real estate before "some judge or clerk," without specifically mentioning deputies. Such statutes should be construed together. (Hilpire v. Claude, 524.)

2. ADOPTION.—INDEXING OF ARTICLES of adoption under the original name of the child and also under its name after adoption is a sufficient compliance with a statute providing for an index of the name of the parents as grantor, and of that of the child as grantee in its original name. Indexing is not essential to the validity of the instrument, and an omission to index exactly as required by statute does not render it invalid, and cannot work any prejudice. (Hilpire v. Claude, 524.)

See Wills, 16.

ADVERSE POSSESSION.

1. TENANT FOR LIFE—POSSESSION AS AGAINST REMAINDERMAN.—The possession of the tenant for life is never deemed to be adverse to the remainderman, as the latter has no right of entry or action for possession during the life term. (Hanson v. Ingwaldson, 692.)

2. COTENANCY—ADVERSE POSSESSION OF GRANTEE.—If one cotenant attempts to convey the whole estate in fee by warranty deed, and his grantee records his deed, and by virtue thereof enters upon the estate and claims and holds exclusive possession of the whole thereof, the entry and claim are adverse to the title and

possession of the other cotenant, and amount to a disseisin. (*Hanson v. Ingwaldson*, 692.)

3. **INFANTS—ADVERSE POSSESSION AGAINST—PARTITION.**—Where a widow is by law entitled to the mansion house of her husband and the messuages belonging thereto until dower is assigned, such dower never being assigned to her, and where her possessory rights are not forfeited by remarriage, the statute of limitations does not begin to run against her husband's infant children until after her death, and the possession of the premises by a purchaser under a deed of partition, made during her life, where the infants have never been legally served with process, is not adverse to such infants so as to bar an action by them brought within the proper time after her death. (*Westmeyer v. Gallenkamp*, 747.)

AGENCY.

1. **PRESUMPTION OF AGENT'S AUTHORITY.**—IT IS PRESUMED that the superintendent of a mining corporation has deputed to him all the powers and authority necessary to a proper discharge of the duties imposed upon him. It is his manifest duty to extinguish a fire in the company's mine in a proper manner, and, *prima facie*, he has the correlative authority to provide proper means to that end. (*Bessemer Land etc. Co. v. Campbell*, 17.)

2. **PAYMENT—AGENT'S AUTHORITY TO RECEIVE BEFORE DEBT IS DUE.**—An agent authorized to collect the principal and interest of a loan has no authority to receive either the principal or interest before it is due, and payment made to him by the debtor before that time is at the latter's risk. (*Park v. Cross*, 630.)

See Banks and Banking, 1-4; Bonds; Deeds, 6; Factors.

APPEAL.

1. **APPEAL—TRIAL OF JUROR'S MISCONDUCT—PRESUMPTION.**—After the trial, upon affidavits and counter-affidavits, of an issue as to a juror's misconduct, an appellate court will presume that the decision of the trial court was correct. (*Stevens v. Leonard*, 446.)

2. **APPEAL—REVIEWING WEIGHT OF EVIDENCE.**—It is not within the province of an appellate court to weigh the evidence, although a preponderance of it against the finding or verdict is apparent and great. (*Stevens v. Leonard*, 446.)

3. **APPEAL.—A BILL OF EXCEPTIONS** filed within five days after the allowance of the appeal, although after the expiration of the term, is seasonably filed. (*Watson v. New Milford*, 345.)

4. **APPELLATE PRACTICE.**—In the absence of a cross-appeal by the appellee, a bill of exceptions filed by him affords no foundation for an enlargement of the judgment, if the point raised does not affect its validity. (*Watson v. New Milford*, 345.)

5. **APPEAL—NEW QUESTION RAISED ON.**—In a petition for rehearing in an appellate court, a party cannot for the first time raise a new question, which was raised neither in the trial court nor in the appellate court at the original hearing. (*Lamar Canal Co. v. Amity Land etc. Co.*, 261.)

6. **APPEAL—FEDERAL QUESTION INVOLVED.**—A certificate that a federal question has been presented so that it may be reviewed upon writ of error from the supreme court of the United States will not be made, where such question is suggested for the

first time in a petition for rehearing after judgment, too late for consideration by the state court. (*Lamar Canal Co. v. Amity Land etc. Co.*, 261.)

7. APPEAL—SUFFICIENCY OF EVIDENCE TO SUPPORT FINDINGS.—Where the evidence is not preserved in a bill of exceptions, it will be presumed, on appeal, that it was sufficient to sustain the findings of the court. (*Mt. Rosa Min. etc. Co. v. Palmer*, 245.)

8. APPEAL—EVIDENCE—SUFFICIENCY OF OBJECTION.—An objection to the introduction of evidence that it is irrelevant and immaterial is insufficient to raise any question as to its competency or admissibility. (*Western Assur. Co. v. McAlpin*, 423.)

9. APPEAL—HARMLESS ERROR.—Although it is error to permit a witness to state who is the owner of certain personal property, such answer being a conclusion, the error is harmless where there is other undisputed evidence of ownership. (*Western Assur. Co. v. McAlpin*, 423.)

10. NEGLIGENCE—CONFLICT OF EVIDENCE—APPEL-LATE PRACTICE.—If, upon the issue of negligence, the evidence is conflicting and justifies a finding either for or against it, the judgment of the lower court cannot be disturbed on appeal. (*Barnes v. Western Union Tel. Co.*, 791.)

See New Trial.

ARMY.

See Courts-martial.

ARREST.

1. ARREST FOR CONTEMPT—FREEDOM FROM—BAIL.—A prisoner who is out on bail, conditioned for his appearance to answer to a criminal charge, is not exempt from arrest and removal to another county by virtue of an order for commitment for contempt of court. (*In re Popejoy*, 222.)

2. ARREST—AUTHORITY OF SHERIFF—WAIVER.—One who voluntarily submits himself to arrest and removal by the sheriff of another county waives his right to object that such sheriff had no authority to act outside of his own county. (*In re Popejoy*, 222.)

ASSIGNMENT FOR CREDITORS.

1. ASSIGNMENT FOR BENEFIT OF CREDITORS—CONFLICT OF LAWS.—The laws of California concerning assignments for the benefit of creditors refer to all persons and property within its jurisdiction, but not to persons and property in a foreign jurisdiction. Hence, an assignment by a foreign corporation of all its property, including a debt due to it from a resident of California, is not void because it fails to conform to the assignment laws of such state, where no rights of any citizen of that state, or of property situate therein, are involved. (*Fenton v. Edwards*, 141.)

2. ASSIGNMENT FOR BENEFIT OF CREDITORS—CONFLICT OF LAWS.—A voluntary assignment, in one state, for the benefit of creditors, valid by the laws of that state, operates to convey personal property, not already subject to liens, in every state where it may be found. (*Fenton v. Edwards*, 141.)

3. ASSIGNMENT FOR BENEFIT OF CREDITORS, BY FOREIGN CORPORATION.—An assignment, by a foreign corporation,

for the benefit of its creditors, conveys all its property to the assignee, including a debt to it due from residents of this state. (*Fenton v. Edwards*, 141.)

4. ASSIGNMENT FOR BENEFIT OF CREDITORS, BY FOREIGN CORPORATION—NOTICE OF, TO DEBTOR—ATTACHMENT.—An assignment made by a foreign corporation for the benefit of its creditors is binding upon its debtor here in attachment proceedings, though he did not receive notice of the assignment before the attachment was served, if he does receive such notice pendente lite in time to avail himself of it in discharge of the suit against him. (*Fenton v. Edwards*, 141.)

5. ASSIGNMENT FOR BENEFIT OF CREDITORS, BY FOREIGN CORPORATION—WHERE MADE—PRESUMPTION.—If an assignment by a foreign corporation for the benefit of creditors, made to an assignee residing in a state where the corporation was doing business, and in conformity with its laws, contains no statement showing where it was made, and this is not otherwise shown, the presumption is that it is valid, and was made in such state, although the home of the corporation was in another state. (*Fenton v. Edwards*, 141.)

See Attachment, 4.

ATTACHMENT.

1. ATTACHMENT—WRONGFUL—ATTORNEY'S LIABILITY. If an attorney places a writ in the hands of an officer, with directions to attach certain specific property, with knowledge that the title to such property is in dispute, and after receiving from his client a sum of money to enforce his claim and to reimburse the officer for any loss he might sustain from the attachment, the attorney is to be regarded as personally requesting the service and personally liable to reimburse the officer if the levy turns out to be wrongful. The fact that the officer, acting in good faith while making the attachment, was shown a bill of sale of the property to a third person, by another than the plaintiff in attachment, and that he failed to inform the attorney of the name of the vendor in such bill of sale, does not preclude his recovery. (*Higgins v. Russo*, 307.)

2. ATTACHMENT—JURISDICTION.—In attachment cases the jurisdiction over the subject matter is obtained by a levy thereon of a writ properly issued, and no matter what nor how great errors or irregularities may subsequently occur the res remains still in the grasp of the court, and its judgment in regard thereto will be valid and binding until reversed on error or appeal or set aside in a direct and appropriate proceeding for that purpose. (*Shea v. Shea*, 779.)

3. ATTACHMENT—JURISDICTION—DEATH OF DEFENDANT.—Where property is seized under a writ of attachment prior to the defendant's death, but the publication of summons is not completed until after his death, the judgment made in such suit in ignorance of the defendant's death is not void, and hence is not open to collateral attack. (*Shea v. Shea*, 779.)

4. ATTACHMENT—GARNISHMENT OF DEBT DUE TO FOREIGN CORPORATION AFTER ASSIGNMENT FOR BENEFIT OF CREDITORS.—A debt due to a foreign corporation from residents of this state is not subject to garnishment here, after such corporation has made an assignment in another state for the benefit of creditors. (*Fenton v. Edwards*, 141.)

5. ATTACHMENT—GARNISHMENT OF DEBT—JURISDICTION.—A court has no power to render a judgment condemning a debt, in a garnishment proceeding, where the situs of the debt is not within the jurisdiction of the court. (*Central of Georgia Ry. Co. v. Brinson*, 382.)

6. ATTACHMENT—GARNISHMENT—SITUS OF DEBT.—A judgment debt due and payable in another state to a creditor, who is a resident of that state, is not subject to garnishment in this state, as the situs of the debt is not within the jurisdiction of the court. (*Central of Georgia Ry. Co. v. Brinson*, 382.)

7. GARNISHMENT—JUDGMENT IN—EFFECT OF.—The legal effect of a garnishment judgment is to sequester or set aside the property or money of the defendant in the hands of the garnishee to the payment of the plaintiff's judgment. (*Bowen v. Port Huron etc. Co.*, 539.)

8. GARNISHMENT—JUDGMENT IN AS SATISFACTION.—A garnishment judgment is *prima facie* a satisfaction or *pro tanto* satisfaction of the plaintiff's judgment against the principal defendant. (*Bowen v. Port Huron etc. Co.*, 539.)

9. GARNISHMENT—JUDGMENT IN AS A SATISFACTION.—If the garnishee, at the time the plaintiff takes judgment against him, is solvent, the defendant, upon paying the difference between the garnishment judgment and judgment in the main action, is entitled to have the latter canceled. (*Bowen v. Port Huron etc. Co.*, 539.)

See Homestead, 11.

ATTORNEYS.

See Attachment, 1; Courts-martial.

AUCTION.

1. CONTRACTS—STATUTE OF FRAUDS—TRUSTEE'S SALES.—MEMORANDUM made on the sale-book of a sheriff, acting as trustee at an auction sale of land under foreclosure of a deed of trust, not showing what land was sold nor to whom, is not admissible as evidence of a contract of sale against the alleged bidder for refusal to take the land. Such memorandum is not admissible if made after the bidder has refused to take the land on the ground that there were prior encumbrances on it. (*Dunham v. Hartman*, 741.)

2. CONTRACTS—STATUTE OF FRAUDS—MEMORANDUM OF TRUSTEE'S SALE—WITHDRAWAL OF BID.—Between the fall of the hammer at an auction sale of land by a trustee under foreclosure of a deed of trust and the writing of the bidder's name and description of the land sold in the memorandum-book of sale he may withdraw his bid, and such memorandum made after his withdrawal has no binding force against him as a contract of sale. (*Dunham v. Hartman*, 741.)

3. CONTRACTS—STATUTE OF FRAUDS—TRUSTEE'S SALE—MEMORANDUM TO BIND BIDDER.—At an auction sale of land under foreclosure of a deed of trust, the trustee, acting as auctioneer, or a sheriff, acting as substituted trustee, in his individual capacity, is not the agent of the buyer, so as to bind him by a memorandum made at the sale. (*Dunham v. Hartman*, 741.)

BAIL.

See Arrest, 1.

BALLOTS.

See Elections, 1-2.

BANKS AND BANKING.

1. BANKS—DUTY OF, AS COLLECTION AGENTS—EMPLOYMENT OF SUBAGENT.—For the purposes of collection, a collecting bank must employ a suitable subagent, when a subagent is necessary. It must not transmit a check, payable at a distant place, directly to the bank by which payment is to be made, with the request that a remittance be made therefor, as no one can be deemed a suitable agent to enforce, in behalf of another, a claim against himself. (*Minneapolis etc. Co. v. Metropolitan Bank*, 609.)

2. BANKS—NEGLIGENCE IN SELECTING COLLECTING AGENT—NOTICE.—A bank receiving a check upon another bank for collection in a distant place cannot, where loss ensues, justify or excuse its negligence in selecting the drawee of the check as a subagent for its collection by a notice printed upon the plaintiff's pass-book, in which the bank declares that, in receiving checks or drafts on deposit, or for collection, it acts only as agent for its customer, and that "when forwarding items to other points, we select agents who are responsible according to our judgment and means of knowledge, but we assume no risk or responsibility on account of their omissions, negligence, or failure, should any occur." (*Minneapolis etc. Co. v. Metropolitan Bank*, 609.)

3. BANKS—NEGLIGENCE IN SELECTING COLLECTING AGENT—USAGE AND CUSTOM.—A bank receiving a check upon another bank for collection, in a distant place, cannot, where loss ensues, justify or excuse its negligence in selecting the drawee of the check as a subagent for its collection by showing that it is usual and customary for banks to send checks and drafts, payable by other banks at distant points, to the drawee directly, by mail, provided there is no other bank of good standing in the same town. Usage and custom do not justify negligence. (*Minneapolis etc. Co. v. Metropolitan Bank*, 609.)

4. BANKS—NEGLIGENCE IN SELECTING COLLECTING AGENT—RESULT.—A bank receiving for collection a check payable by another bank at a distant point cannot, in case of nonpayment, escape liability for its negligence in sending the check directly to the drawee, by showing that the result would have been the same had a third party been selected to present the check. (*Minneapolis etc. Co. v. Metropolitan Bank*, 609.)

BENEFIT SOCIETIES.

See Insurance, 27-29.

BILL OF EXCEPTIONS.

See Appeal, 3.

BILLS OF LADING.

1. BILLS OF LADING—NEGOTIATIONS AND
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 are received, but the route which the
 are con- mitted charged in

he bill of lading, which will be received as the sole evidence of the agreement between the parties. (*McElveen v. Southern Ry. Co.*, 371.)

2. BILLS OF LADING—COMPLIANCE WITH—CONNECTING CARRIERS—RAILWAYS AND STEAMERS.—If a bill of lading provides for the transportation of freight, such as fruit, by an initial railway carrier to a certain place, and its delivery there, in good order, to a connecting railway, "or steamer," to be forwarded to its destination, the contract of carriage is bounded with when the railway company delivers the freight to a connecting line of steamers at such place, whereby it is transported, ready for delivery, to the consignee. Hence, under a statute making it the duty of the initial carrier, on notice, to trace goods sent where there are connecting lines, the consignee has no claim of action against the initial carrier for a failure to trace the freight, for it was not, in fact, been lost at all. The consignee should have required of the water carrier for the freight. (*McElveen v. Southern Ry. Co.*, 371.)

3. EVIDENCE—VARYING CONTRACT BY PAROL.—A BILL OF LADING, except as to the acknowledgment of the receipt of the goods, and of their quantity and condition when received, is a written contract which cannot be varied by parol evidence. (*McElveen v. Southern Ry. Co.*, 371.)

BONDS

1. BOND OF INSURANCE AGENT—ACTION ON—ESTIMATED RES GESTAE.—If a person, appointed by an insurance company as its agent, gives a bond for the faithful performance of his duties, and an action is brought thereon to recover a balance due for premiums claimed to have been collected by him, his reports to the company, made in the usual course of business, are a part of the *res gestae*, and are admissible in evidence. (*Capital Fire Ins. Co. v. Watson*, 657.)

2. BOND OF INSURANCE AGENT COVERS WHAT.—A bond given by an insurance agent for the faithful performance of his duties covers insurance premiums collected by him, which he fails to pay over to the company. (*Capital Fire Ins. Co. v. Watson*, 657.)

3. BOND OF INSURANCE AGENT—ACTION ON—DEFENSE FOR SURETIES—KNOWLEDGE OF FORMER DISHONESTY.—If an insurance company takes a person for its agent, and requires a bond for the faithful performance of his duties, it implicitly represents that, so far as it knows, such person is honest and that it believes him to be so. If, at this time, it knows that he has been dishonest and a defaulter as the agent of another company, but fails to disclose such knowledge to the sureties, it precludes a fraud on them, which they may plead in defense to an action on the bond. (*Capital Fire Ins. Co. v. Watson*, 657.)

4. BOND OF INSURANCE AGENT—ACTION ON—DEFENSE FOR SURETIES—DISHONESTY WITHOUT NOTIFICATION.—If an insurance company takes a person for its agent, and requires a bond for the faithful performance of his duties, and such employment may be terminated, at any time, by either party, and it is known that the company, during the course of the employment, allowed the agent wrongfully converted its monies to his own use, but that, after such knowledge, the company continued him in its service without notifying the sureties of his dishonesty, and set up, in a defense for them in an action on the bond. (*Capital Fire Ins. Co. v. Watson*, 657.)

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See Officers, 1; Taxes, 3.

BOOKS AND PAPERS.

See Evidence.

BURGLARY.

CRIMINAL LAW—ASSENT OF OWNER AS DEFENSE TO CRIME—ACTS OF SERVANT.—If a clerk in a store, having neither the custody, nor the right to admit anyone thereto, at the time a burglary is committed therein, and for the purpose of apprehending the accused, knowing that the crime is to be committed, but without the knowledge or consent of the owner of the store, loans a detective a key thereto in order to allow a duplicate to be made for the use of the accused, the acts of the clerk are no defense to the crime. His assent to the criminal entry of the store by the accused by means of such key cannot be imputed to the owner of the store. (*State v. Abley*, 520.)

CERTIORARI.

CERTIORARI—JURISDICTION.—The question of jurisdiction of the court is the limit of inquiry upon certiorari. (*Ahlens v. Thomas*, 820.)

CHOSES IN ACTION.

See Conflict of Laws; Husband and Wife, 11, 12.

COMMISSION MERCHANTS.

See Factors; Police Power, 4, 5.

CONFLICT OF LAWS.

A CHOSE IN ACTION HAS NO DEFINITE SITUS, but follows the person of its owner. (*Fenton v. Edwards*, 141.)

See Assignment for Creditors, 1-5; Attachment, 4-6; Intoxicating Liquors, 6; Railroads, 15.

CONSTITUTIONAL LAW.

See Courts-martial, 1; Evidence, 4-7; Injunctions, 3; Licenses; Nuisance, 4; Police Power; Statutes; Taxes, 7-11.

CONTEMPT.

1. CONTEMPT—JURISDICTION—HABEAS CORPUS.—Where a court has jurisdiction of the person and of the subject matter of the action, an order committing for contempt will, upon habeas corpus proceedings, be conclusively presumed to be correct. (*In re Popejoy*, 222.)

2. CONTEMPT.—A WARRANT COMMITTING for contempt is not required to recite that the prisoner was able to perform the act for the refusal to do which he was committed to jail. (*In re Popejoy*, 222.)

3. CONSTITUTIONAL LAW—IMPRISONMENT FOR CONTEMPT.—A constitutional provision, prohibiting imprisonment for debt, does not forbid the punishment of a contempt in refusing to obey the lawful orders or decrees of a court; hence, the imprisonment of a husband for his refusal to pay a judgment for the sep-

rate maintenance of his wife is not an imprisonment for debt. (In re Popejoy, 222.)

See Arrest, 1; Evidence, 7; Husband and Wife, 9.

CONTRACTS.

1. CONTRACTS.—THE INTERPRETATION OR CONSTRUCTION of a contract is a question of law for the court. (Arkansas Fire Ins. Co. v. Wilson, 129.)

2. CONTRACTS—VALIDITY—PRESUMPTION.—If it is contended that a statute is void, as impairing the obligation of the contract in suit, and the pleadings do not show when the contract was executed, it cannot be presumed that the contract antedated the statute. (Blair v. Ostrander, 532.)

3. CONTRACTS IN WRITING—ALTERING BY PAROL—AN EXECUTED ORAL AGREEMENT, which may be proved for the purpose of altering a previous written contract, must consist in the doing or the suffering of something not required to be done or suffered by the terms of the writing. (Mackenzie v. Hodgkin, 209.)

4. STATUTE OF FRAUDS—UNCERTAINTY OF DESCRIPTION.—Under the statute of frauds the written agreement or memorandum must describe the subject matter directly or by reference to something outside of the writing, by resorting to which certainty may be attained. (Alabama Mineral Land Co. v. Jackson, 46.)

5. SPECIFIC PERFORMANCE—UNCERTAINTY OF CONTRACT.—A contract which is so uncertain in respect of its subject matter that it neither identifies the thing by describing it, nor furnishes any data by which certainty of identification can be attained, is void. (Alabama Mineral Land Co. v. Jackson, 46.)

6. STATUTE OF FRAUDS—EFFECT OF CONTRACTS.—A contract falling under the influence of the statute of frauds, and not complying with its provisions, cannot be directly enforced, nor can damages be awarded for its violation. (Alabama Mineral Land Co. v. Jackson, 46.)

7. CONTRACTS—VALUABLE CONSIDERATION—WHAT IS. The extinguishment of, or security for, a pre-existing debt constitutes a valuable consideration for the sale or assignment of property. (Hart v. Church, 195.)

CONVERSION.

See Sequestration, 8.

CORPORATIONS.

1. CORPORATIONS—INSOLVENCY—LIABILITY OF STOCKHOLDERS.—Upon a showing by the receiver of an insolvent bank that its assets are not sufficient to pay its depositors, the circuit court has jurisdiction to ascertain ex parte the amount required to meet the deficiency, and to direct that proceedings be instituted to enforce the statutory liability of the stockholders. (Foster v. Row, 565.)

2. CORPORATIONS—INSOLVENCY—LIABILITY OF STOCKHOLDERS.—The liability of stockholders in an insolvent bank for the benefit of depositors is not a merely collateral undertaking non penal in its nature, but is contractual and immediately enforceable, not exceeding the par value of the stock, when it is shown that the assets are insufficient to pay the depositors. (Foster v. Row, 565.)

3. CORPORATIONS—LIABILITY OF STOCKHOLDERS.—A constitutional provision making the stockholders of every banking corporation issuing bank-notes individually liable for all debts of the corporation to the amount of their respective shares is confined to banks of issue, and does not limit the power of the legislature to fix the liability of stockholders in banks not of issue. (*Foster v. Row*, 565.)

4. CORPORATIONS—INSOLVENCY—LIABILITY OF STOCKHOLDERS.—Under a statute making the stockholders in a bank upon its insolvency, individually liable, for the benefit of the depositors, to the amount of their stock at the par value thereof, the stockholders thus liable are those who are such when the bank becomes insolvent, without reference to the time when the deposits were actually made. (*Foster v. Row*, 565.)

5. CORPORATIONS—INSOLVENCY—LIABILITY OF STOCKHOLDERS.—If a banking corporation has become insolvent, and an action has been commenced to enforce the statutory liability of stockholders, one who has, up to that time, allowed his name to appear as a stockholder cannot avoid liability on the ground that his subscription was obtained by fraud. (*Foster v. Row*, 565.)

6. CORPORATIONS—INSOLVENCY—LIABILITY OF STOCKHOLDERS.—If a purchaser of bank stock could, at any time, have compelled a transfer to him upon the books of the bank, he is a stockholder therein, and upon the insolvency of the bank he cannot escape his statutory liability on the ground that the stock has not been transferred to him on the books of the bank. (*Foster v. Row*, 565.)

7. CORPORATIONS — LIABILITY OF STOCKHOLDERS—WHEN CEASES.—A person who holds stock in a bank ceases to be a stockholder or liable as such when he sells and delivers his stock duly assigned to the cashier of the bank, although the cashier never pays the bank therefor or registers the stock to himself. (*Foster v. Row*, 565.)

8. CORPORATIONS—INSOLVENCY—TRANSFER OF STOCK—LIABILITY OF STOCKHOLDER—BURDEN OF PROOF.—Although a stockholder in a bank transfers his stock when the bank is in a failing condition, he cannot after its insolvency be held liable, in the absence of proof of bad faith and that he knew of the failing condition of the bank, and the burden of proof is on the receiver thereof to show such knowledge on the part of the stockholder, and that the transfer was made for the fraudulent purpose of avoiding a stockholder's liability. (*Foster v. Row*, 565.)

9. CORPORATION—INSOLVENCY—TRANSFER OF STOCK TO NONRESIDENT.—A person who owns stock in a bank which is in a failing condition may in good faith validly transfer it to a nonresident. (*Foster v. Row*, 565.)

10. CORPORATION—INSOLVENCY—TRANSFER OF STOCK. A stockholder in a going corporation may make a bona fide gift and transfer of his stock, and after such transfer is duly registered and the corporation becomes insolvent, the donor cannot be held liable on the stock unless he knew of the insolvency at the time of making the transfer. (*Foster v. Row*, 565.)

11. CORPORATIONS — INSOLVENCY — STOCKHOLDERS — LIABILITY.—AN ACTION TO ENFORCE the statutory liability of stockholders in an insolvent corporation must be brought by a creditor thereof, and cannot be maintained by a receiver, either general or special. (*McLaughlin v. Kimball*, 908.)

12. CORPORATIONS, FOREIGN—RIGHT TO IMPOSE CONDITIONS—CONSTITUTIONAL LAW.—A statute requiring all foreign insurance companies to pay a tax on their business in the state, as a condition of their doing business therein, and imposing a higher tax on them than is imposed upon domestic insurers, is not a special or local law, nor is it in violation of constitutional provisions requiring that all laws of a general nature shall have a uniform operation, and that the general assembly shall not grant to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens. (*Scottish etc. Ins. Co. v. Herriott*, 548.)

13. CORPORATIONS, FOREIGN—RIGHT OF STATE TO EXCLUDE OR IMPOSE CONDITIONS.—A state may exclude a foreign corporation from doing business therein, and it is not prohibited from discriminating in the privileges it may grant to such corporation as a condition of its doing business within its limits. (*Scottish etc. Ins. Co. v. Herriott*, 548.)

14. CORPORATIONS, FOREIGN—TREATY RIGHTS.—A corporation organized in Great Britain, and having its principal place of business there, is not a subject thereof, within the meaning of a treaty giving subjects of that country the right to do business in any of the states of the United States on the same terms as natives. (*Scottish etc. Ins. Co. v. Herriott*, 548.)

15. FOREIGN CORPORATIONS—EMINENT DOMAIN.—A statute which confers on foreign corporations obtaining permits to do business in the state all the privileges enjoyed by domestic corporations, includes the right of eminent domain in condemnation proceedings. (*San Antonio etc. Ry. Co. v. Southwestern Tel. etc. Co.*, 54.)

See Assignment for Creditors, 3-5; **Attachment**, 4; **Husband and Wife**, 13; **Taxes**, 5, 6.

COSTS.

1. COSTS—RETAXATION OF—ERRONEOUS FINDING.—If two issues are presented, upon one of which there is a finding for the plaintiff, and upon the other an erroneous ruling for the defendant, and the court divides the costs, the cost of the trial of the latter issue should be retaxed in favor of the plaintiff. (*Bathgate v. Irvine*, 158.)

2. TRIAL—COSTS IN SPECIAL PROCEEDINGS.—In contempt proceedings to enforce a judgment, costs may be awarded to the revalling party. (*Ahlers v. Thomas*, 820.)

3. JUDGMENTS—TORTS—COSTS.—If an action is in tort, judgment for the defendant for costs follows the complaint and is also a tort. (*Northern v. Hanners*, 74.)

4. EXEMPTIONS—COSTS—ACTION IN TORT.—If, in an action in tort, defendant recovers judgment for costs, plaintiff cannot claim his statutory exemption against the execution issued against him for such costs. (*Northern v. Hanners*, 74.)

COTENANCY.

See Adverse Possession, 2.

COURTS-MARTIAL.

1. CONSTITUTIONAL LAW—COURTS-MARTIAL—RIGHT OF ACCUSED TO COUNSEL.—Under a constitutional provision

possession of the other cotenant, and amount to a disseisin. (*Hanson v. Ingwaldson*, 692.)

3. INFANTS—ADVERSE POSSESSION AGAINST—PARTITION.—Where a widow is by law entitled to the mansion house of her husband and the messuages belonging thereto until dower is assigned, such dower never being assigned to her, and where her possessory rights are not forfeited by remarriage, the statute of limitations does not begin to run against her husband's infant children until after her death, and the possession of the premises by a purchaser under a deed of partition, made during her life, where the infants have never been legally served with process, is not adverse to such infants so as to bar an action by them brought within the proper time after her death. (*Westmeyer v. Gallenkamp*, 747.)

AGENCY.

1. PRESUMPTION OF AGENT'S AUTHORITY.—IT IS PRESUMED that the superintendent of a mining corporation has deputed to him all the powers and authority necessary to a proper discharge of the duties imposed upon him. It is his manifest duty to extinguish a fire in the company's mine in a proper manner, and, *prima facie*, he has the correlative authority to provide proper means to that end. (*Bessemer Land etc. Co. v. Campbell*, 17.)

2. PAYMENT—AGENT'S AUTHORITY TO RECEIVE BEFORE DEBT IS DUE.—An agent authorized to collect the principal and interest of a loan has no authority to receive either the principal or interest before it is due, and payment made to him by the debtor before that time is at the latter's risk. (*Park v. Cross*, 630.)

See Banks and Banking, 1-4; Bonds; Deeds, 6; Factors.

APPEAL.

1. APPEAL—TRIAL OF JUROR'S MISCONDUCT—PRESUMPTION.—After the trial, upon affidavits and counter-affidavits, of an issue as to a juror's misconduct, an appellate court will presume that the decision of the trial court was correct. (*Stevens v. Leonard*, 446.)

2. APPEAL—REVIEWING WEIGHT OF EVIDENCE.—It is not within the province of an appellate court to weigh the evidence, although a preponderance of it against the finding or verdict is apparent and great. (*Stevens v. Leonard*, 446.)

3. APPEAL.—A BILL OF EXCEPTIONS filed within five days after the allowance of the appeal, although after the expiration of the term, is seasonably filed. (*Watson v. New Milford*, 345.)

4. APPELLATE PRACTICE.—In the absence of a cross-appeal by the appellee, a bill of exceptions filed by him affords no foundation for an enlargement of the judgment, if the point raised does not affect its validity. (*Watson v. New Milford*, 345.)

5. APPEAL—NEW QUESTION RAISED ON.—In a petition for rehearing in an appellate court, a party cannot for the first time raise a new question, which was raised neither in the trial court nor in the appellate court at the original hearing. (*Lamar Canal Co. v. Amity Land etc. Co.*, 261.)

6. APPEAL—FEDERAL QUESTION INVOLVED.—A certificate that a federal question has been presented so that it may be reviewed upon writ of error from the supreme court of the United States will not be made, where such question is suggested for the

first time in a petition for rehearing after judgment, too late for consideration by the state court. (*Lamar Canal Co. v. Amity Land etc. Co.*, 261.)

7. APPEAL—SUFFICIENCY OF EVIDENCE TO SUPPORT FINDINGS.—Where the evidence is not preserved in a bill of exceptions, it will be presumed, on appeal, that it was sufficient to sustain the findings of the court. (*Mt. Rosa Min. etc. Co. v. Palmer*, 245.)

8. APPEAL—EVIDENCE—SUFFICIENCY OF OBJECTION.—An objection to the introduction of evidence that it is irrelevant and immaterial is insufficient to raise any question as to its competency or admissibility. (*Western Assur. Co. v. McAlpin*, 423.)

9. APPEAL—HARMLESS ERROR.—Although it is error to permit a witness to state who is the owner of certain personal property, such answer being a conclusion, the error is harmless where there is other undisputed evidence of ownership. (*Western Assur. Co. v. McAlpin*, 423.)

10. NEGLIGENCE—CONFLICT OF EVIDENCE—APPELLATE PRACTICE.—If, upon the issue of negligence, the evidence is conflicting and justifies a finding either for or against it, the judgment of the lower court cannot be disturbed on appeal. (*Barnes v. Western Union Tel. Co.*, 791.)

See New Trial.

ARMY.

See Courts-martial.

ARREST.

1. ARREST FOR CONTEMPT—FREEDOM FROM—BAIL.—A prisoner who is out on bail, conditioned for his appearance to answer to a criminal charge, is not exempt from arrest and removal to another county by virtue of an order for commitment for contempt of court. (*In re Popejoy*, 222.)

2. ARREST—AUTHORITY OF SHERIFF—WAIVER.—One who voluntarily submits himself to arrest and removal by the sheriff of another county waives his right to object that such sheriff had no authority to act outside of his own county. (*In re Popejoy*, 222.)

ASSIGNMENT FOR CREDITORS.

1. ASSIGNMENT FOR BENEFIT OF CREDITORS—CONFLICT OF LAWS.—The laws of California concerning assignments for the benefit of creditors refer to all persons and property within its jurisdiction, but not to persons and property in a foreign jurisdiction. Hence, an assignment by a foreign corporation of all its property, including a debt due to it from a resident of California, is not void because it fails to conform to the assignment laws of such state, where no rights of any citizen of that state, or of property situate therein, are involved. (*Fenton v. Edwards*, 141.)

2. ASSIGNMENT FOR BENEFIT OF CREDITORS—CONFLICT OF LAWS.—A voluntary assignment, in one state, for the benefit of creditors, valid by the laws of that state, operates to convey personal property, not already subject to liens, in every state where it may be found. (*Fenton v. Edwards*, 141.)

3. ASSIGNMENT FOR BENEFIT OF CREDITORS, BY FOREIGN CORPORATION.—An assignment, by a foreign corporation,

for the benefit of its creditors, conveys all its property to the assignee, including a debt to it due from residents of this state. (*Fenton v. Edwards*, 141.)

4. ASSIGNMENT FOR BENEFIT OF CREDITORS, BY FOREIGN CORPORATION—NOTICE OF, TO DEBTOR—ATTACHMENT.—An assignment made by a foreign corporation for the benefit of its creditors is binding upon its debtor here in attachment proceedings, though he did not receive notice of the assignment before the attachment was served, if he does receive such notice pendente lite in time to avail himself of it in discharge of the suit against him. (*Fenton v. Edwards*, 141.)

5. ASSIGNMENT FOR BENEFIT OF CREDITORS, BY FOREIGN CORPORATION—WHERE MADE—PRESUMPTION.—If an assignment by a foreign corporation for the benefit of creditors, made to an assignee residing in a state where the corporation was doing business, and in conformity with its laws, contains no statement showing where it was made, and this is not otherwise shown, the presumption is that it is valid, and was made in such state, although the home of the corporation was in another state. (*Fenton v. Edwards*, 141.)

See Attachment, 4.

ATTACHMENT.

1. ATTACHMENT—WRONGFUL—ATTORNEY'S LIABILITY. If an attorney places a writ in the hands of an officer, with directions to attach certain specific property, with knowledge that the title to such property is in dispute, and after receiving from his client a sum of money to enforce his claim and to reimburse the officer for any loss he might sustain from the attachment, the attorney is to be regarded as personally requesting the service and personally liable to reimburse the officer if the levy turns out to be wrongful. The fact that the officer, acting in good faith while making the attachment, was shown a bill of sale of the property to a third person, by another than the plaintiff in attachment, and that he failed to inform the attorney of the name of the vendor in such bill of sale, does not preclude his recovery. (*Higgins v. Russo*, 307.)

2. ATTACHMENT—JURISDICTION.—In attachment causes the jurisdiction over the subject matter is obtained by a levy thereon of a writ properly issued, and no matter what nor how great errors or irregularities may subsequently occur the res remains still in the grasp of the court, and its judgment in regard thereto will be valid and binding until reversed on error or appeal or set aside in a direct and appropriate proceeding for that purpose. (*Shea v. Shea*, 779.)

3. ATTACHMENT—JURISDICTION—DEATH OF DEFENDANT.—Where property is seized under a writ of attachment prior to the defendant's death, but the publication of summons is not completed until after his death, the judgment made in such suit in ignorance of the defendant's death is not void, and hence is not open to collateral attack. (*Shea v. Shea*, 779.)

4. ATTACHMENT—GARNISHMENT OF DEBT DUE TO FOREIGN CORPORATION AFTER ASSIGNMENT FOR BENEFIT OF CREDITORS.—A debt due to a foreign corporation from residents of this state is not subject to garnishment here, after such corporation has made an assignment in another state for the benefit of creditors. (*Fenton v. Edwards*, 141.)

5. ATTACHMENT—GARNISHMENT OF DEBT—JURISDICTION.—A court has no power to render a judgment condemning a debt, in a garnishment proceeding, where the situs of the debt is not within the jurisdiction of the court. (Central of Georgia Ry. Co. v. Brinson, 382.)

6. ATTACHMENT—GARNISHMENT—SITUS OF DEBT.—A judgment debt due and payable in another state to a creditor, who is a resident of that state, is not subject to garnishment in this state, as the situs of the debt is not within the jurisdiction of the court. (Central of Georgia Ry. Co. v. Brinson, 382.)

7. GARNISHMENT—JUDGMENT IN—EFFECT OF.—The legal effect of a garnishment judgment is to sequester or set aside the property or money of the defendant in the hands of the garnishee to the payment of the plaintiff's judgment. (Bowen v. Port Huron etc. Co., 539.)

8. GARNISHMENT—JUDGMENT IN AS SATISFACTION.—A garnishment judgment is prima facie a satisfaction or pro tanto satisfaction of the plaintiff's judgment against the principal defendant. (Bowen v. Port Huron etc. Co., 539.)

9. GARNISHMENT—JUDGMENT IN AS A SATISFACTION.—If the garnishee, at the time the plaintiff takes judgment against him, is solvent, the defendant, upon paying the difference between the garnishment judgment and judgment in the main action, is entitled to have the latter canceled. (Bowen v. Port Huron etc. Co., 539.)

See Homestead, 11.

ATTORNEYS.

See Attachment, 1; Courts-martial.

AUCTION.

1. CONTRACTS—STATUTE OF FRAUDS—TRUSTEE'S SALES.—MEMORANDUM made on the sale-book of a sheriff, acting as trustee at an auction sale of land under foreclosure of a deed of trust, not showing what land was sold nor to whom, is not admissible as evidence of a contract of sale against the alleged bidder for refusal to take the land. Such memorandum is not admissible if made after the bidder has refused to take the land on the ground that there were prior encumbrances on it. (Dunham v. Hartman, 741.)

2. CONTRACTS—STATUTE OF FRAUDS—MEMORANDUM OF TRUSTEE'S SALE—WITHDRAWAL OF BID.—Between the fall of the hammer at an auction sale of land by a trustee under foreclosure of a deed of trust and the writing of the bidder's name and description of the land sold in the memorandum-book of sale he may withdraw his bid, and such memorandum made after his withdrawal has no binding force against him as a contract of sale. (Dunham v. Hartman, 741.)

3. CONTRACTS—STATUTE OF FRAUDS—TRUSTEE'S SALE—MEMORANDUM TO BIND BIDDER.—At an auction sale of land under foreclosure of a deed of trust, the trustee, acting as auctioneer, or a sheriff, acting as substituted trustee, in his individual capacity, is not the agent of the buyer, so as to bind him by a memorandum made at the sale. (Dunham v. Hartman, 741.)

BAIL.

See Arrest, 1.

BALLOTS.

See Elections, 1-2.

BANKS AND BANKING.

1. BANKS—DUTY OF, AS COLLECTION AGENTS—EMPLOYMENT OF SUBAGENT.—For the purposes of collection, a collecting bank must employ a suitable subagent, when a subagent is necessary. It must not transmit a check, payable at a distant place, directly to the bank by which payment is to be made, with the request that a remittance be made therefor, as no one can be deemed a suitable agent to enforce, in behalf of another, a claim against himself. (*Minneapolis etc. Co. v. Metropolitan Bank*, 609.)

2. BANKS—NEGLIGENCE IN SELECTING COLLECTING AGENT—NOTICE.—A bank receiving a check upon another bank for collection in a distant place cannot, where loss ensues, justify or excuse its negligence in selecting the drawee of the check as a subagent for its collection by a notice printed upon the plaintiff's pass-book, in which the bank declares that, in receiving checks or drafts on deposit, or for collection, it acts only as agent for its customer, and that "when forwarding items to other points, we select agents who are responsible according to our judgment and means of knowledge, but we assume no risk or responsibility on account of their omissions, negligence, or failure, should any occur." (*Minneapolis etc. Co. v. Metropolitan Bank*, 609.)

3. BANKS—NEGLIGENCE IN SELECTING COLLECTING AGENT—USAGE AND CUSTOM.—A bank receiving a check upon another bank for collection, in a distant place, cannot, where loss ensues, justify or excuse its negligence in selecting the drawee of the check as a subagent for its collection by showing that it is usual and customary for banks to send checks and drafts, payable by other banks at distant points, to the drawee directly, by mail, provided there is no other bank of good standing in the same town. Usage and custom do not justify negligence. (*Minneapolis etc. Co. v. Metropolitan Bank*, 609.)

4. BANKS—NEGLIGENCE IN SELECTING COLLECTING AGENT—RESULT.—A bank receiving for collection a check payable by another bank at a distant point cannot, in case of nonpayment, escape liability for its negligence in sending the check directly to the drawee, by showing that the result would have been the same had a third party been selected to present the check. (*Minneapolis etc. Co. v. Metropolitan Bank*, 609.)

BENEFIT SOCIETIES.

See Insurance, 27-29.

BILL OF EXCEPTIONS.

See Appeal, 3.

BILLS OF LADING.

1. BILLS OF LADING.—ALL ORAL NEGOTIATIONS AND REPRESENTATIONS, not only as to the terms and conditions on which goods are received, but also as to the route by which they are to be forwarded, are conclusively presumed to be merged in

the bill of lading, which will be received as the sole evidence of the agreement between the parties. (*McElveen v. Southern Ry. Co.*, 371.)

2. BILLS OF LADING—COMPLIANCE WITH—CONNECTING CARRIERS—RAILWAYS AND STEAMERS.—If a bill of lading provides for the transportation of freight, such as fruit trees, by an initial railway carrier to a certain place, and its delivery there, in good order, to a connecting railway, "or steamer," to be forwarded to its destination, the contract of carriage is complied with when the railway company delivers the freight to a connecting line of steamers at such place, whereby it is transported, ready for delivery, to the consignee. Hence, under a statute making it the duty of the initial carrier, on notice, to trace goods lost, where there are connecting lines, the consignor has no right of action against the initial carrier for a failure to trace the freight, for it has not, in fact, been lost at all. The consignee should have inquired of the water carrier for the freight. (*McElveen v. Southern Ry. Co.*, 371.)

3. EVIDENCE—VARYING CONTRACT BY PAROL—A BILL OF LADING, except as to the acknowledgment of the receipt of the goods, and of their quantity and condition when received, is a written contract which cannot be varied by parol evidence. (*McElveen v. Southern Ry. Co.*, 371.)

BONDS.

1. BOND OF INSURANCE AGENT—ACTION ON—EVIDENCE—RES GESTAE.—If a person, appointed by an insurance company as its agent, gives a bond for the faithful performance of his duties, and an action is brought thereon to recover a balance due for premiums claimed to have been collected by him, his reports to the company, made in the usual course of business, are a part of the *res gestae*, and are admissible in evidence. (*Capital Fire Ins. Co. v. Watson*, 657.)

2. BOND OF INSURANCE AGENT COVERS WHAT.—A bond given by an insurance agent for the faithful performance of his duties covers insurance premiums collected by him, which he fails to pay over to the company. (*Capital Fire Ins. Co. v. Watson*, 657.)

3. BOND OF INSURANCE AGENT—ACTION ON—DEFENSE FOR SURETIES—KNOWLEDGE OF FORMER DISHONESTY.—If an insurance company takes a person for its agent, but exacts a bond for the faithful performance of his duties, it impliedly represents that, so far as it knows, such person is honest and that it believes him to be so. If, at this time, it knows that he has been dishonest and a defaulter as the agent of another company, but fails to disclose such knowledge to the sureties, it perpetrates a fraud on them, which they may plead in defense to an action on the bond. (*Capital Fire Ins. Co. v. Watson*, 657.)

4. BOND OF INSURANCE AGENT—ACTION ON—DEFENSE FOR SURETIES—DISHONESTY WITHOUT NOTIFICATION.—If an insurance company takes a person for its agent, but exacts a bond for the faithful performance of his duties, and such employment may be terminated, at any time, by either party, allegations that the company, during the course of the employment, knew that the agent wrongfully converted its moneys to his own use, but that, after such knowledge, the company continued him in its service without notifying the sureties of his dishonesty, state, *pro tanto*, a defense for them in an action on the bond. (*Capital Fire Ins. Co. v. Watson*, 657.)

See Officers, 1; Taxes, 3.

BOOKS AND PAPERS.

See Evidence.

BURGLARY.

CRIMINAL LAW—ASSENT OF OWNER AS DEFENSE TO CRIME—ACTS OF SERVANT.—If a clerk in a store, having neither the custody, nor the right to admit anyone thereto, at the time a burglary is committed therein, and for the purpose of apprehending the accused, knowing that the crime is to be committed, but without the knowledge or consent of the owner of the store, loans a detective a key thereto in order to allow a duplicate to be made for the use of the accused, the acts of the clerk are no defense to the crime. His assent to the criminal entry of the store by the accused by means of such key cannot be imputed to the owner of the store. (*State v. Abley*, 520.)

CERTIORARI.

CERTIORARI—JURISDICTION.—The question of jurisdiction of the court is the limit of inquiry upon certiorari. (*Ahlens v. Thomas*, 820.)

CHOSES IN ACTION.

See Conflict of Laws; Husband and Wife, 11, 12.

COMMISSION MERCHANTS.

See Factors; Police Power, 4, 5.

CONFLICT OF LAWS.

A CHOSE IN ACTION HAS NO DEFINITE SITUS, but follows the person of its owner. (*Fenton v. Edwards*, 141.)

See Assignment for Creditors, 1-5; Attachment, 4-6; Intoxicating Liquors, 6; Railroads, 15.

CONSTITUTIONAL LAW.

See Courts-martial, 1; Evidence, 4-7; Injunctions, 3; Licenses; Nuisance, 4; Police Power; Statutes; Taxes, 7-11.

CONTEMPT.

1. **CONTEMPT—JURISDICTION—HABEAS CORPUS.**—Where a court has jurisdiction of the person and of the subject matter of the action, an order committing for contempt will, upon habeas corpus proceedings, be conclusively presumed to be correct. (*In re Popejoy*, 222.)

2. **CONTEMPT.—A WARRANT COMMITTING** for contempt is not required to recite that the prisoner was able to perform the act for the refusal to do which he was committed to jail. (*In re Popejoy*, 222.)

3. **CONSTITUTIONAL LAW—IMPRISONMENT FOR CONTEMPT.**—A constitutional provision, prohibiting imprisonment for debt, does not forbid the punishment of a contempt in refusing to obey the lawful orders or decrees of a court; hence, the imprisonment of a husband for his refusal to pay a judgment for the sepa-

the maintenance of his wife is not an imprisonment for debt. (In Popejoy, 222.)

See Arrest, 1; Evidence, 7; Husband and Wife, 9.

CONTRACTS.

1. CONTRACTS.—THE INTERPRETATION OR CONSTRUCTION of a contract is a question of law for the court. (Arkansas Fire Ins. Co. v. Wilson, 129.)

2. CONTRACTS—VALIDITY—PRESUMPTION.—If it is contended that a statute is void, as impairing the obligation of the contract in suit, and the pleadings do not show when the contract was executed, it cannot be presumed that the contract antedated the statute. (Blair v. Ostrander, 532.)

3. CONTRACTS IN WRITING—ALTERING BY PAROL—AN EXECUTED ORAL AGREEMENT, which may be proved for the purpose of altering a previous written contract, must consist in the doing or the suffering of something not required to be done or suffered by the terms of the writing. (Mackenzie v. Hodgkin, 209.)

4. STATUTE OF FRAUDS—UNCERTAINTY OF DESCRIPTION.—Under the statute of frauds the written agreement or memorandum must describe the subject matter directly or by reference to something outside of the writing, by resorting to which certainty may be attained. (Alabama Mineral Land Co. v. Jackson, 46.)

5. SPECIFIC PERFORMANCE—UNCERTAINTY OF CONTRACT.—A contract which is so uncertain in respect of its subject matter that it neither identifies the thing by describing it, nor furnishes any data by which certainty of identification can be attained, is void. (Alabama Mineral Land Co. v. Jackson, 46.)

6. STATUTE OF FRAUDS—EFFECT OF CONTRACTS.—A contract falling under the influence of the statute of frauds, and not complying with its provisions, cannot be directly enforced, nor can damages be awarded for its violation. (Alabama Mineral Land Co. v. Jackson, 46.)

7. CONTRACTS—VALUABLE CONSIDERATION—WHAT IS. The extinguishment of, or security for, a pre-existing debt constitutes a valuable consideration for the sale or assignment of property. (Hart v. Church, 195.)

CONVERSION.

See Sequestration, 3.

CORPORATIONS.

1. CORPORATIONS—INSOLVENCY—LIABILITY OF STOCKHOLDERS.—Upon a showing by the receiver of an insolvent bank that its assets are not sufficient to pay its depositors, the circuit court has jurisdiction to ascertain ex parte the amount required to meet the deficiency, and to direct that proceedings be instituted to enforce the statutory liability of the stockholders. (Foster v. Row, 565.)

2. CORPORATIONS—INSOLVENCY—LIABILITY OF STOCKHOLDERS.—The liability of stockholders in an insolvent bank for the benefit of depositors is not a merely collateral undertaking nor penal in its nature, but is contractual and immediately enforceable, not exceeding the par value of the stock, when it is shown that the assets are insufficient to pay the depositors. (Foster v. Row, 565.)

3. CORPORATIONS—LIABILITY OF STOCKHOLDERS.—A constitutional provision making the stockholders of every banking corporation issuing bank-notes individually liable for all debts of the corporation to the amount of their respective shares is confined to banks of issue, and does not limit the power of the legislature to fix the liability of stockholders in banks not of issue. (*Foster v. Row*, 565.)

4. CORPORATIONS—INSOLVENCY—LIABILITY OF STOCKHOLDERS.—Under a statute making the stockholders in a bank, upon its insolvency, individually liable, for the benefit of the depositors, to the amount of their stock at the par value thereof, the stockholders thus liable are those who are such when the bank becomes insolvent, without reference to the time when the deposits were actually made. (*Foster v. Row*, 565.)

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11. CORPORATIONS — INSOLVENCY — STOCKHOLDERS — LIABILITY.—AN ACTION TO ENFORCE the statutory liability of stockholders in an insolvent corporation must be brought by a creditor thereof, and cannot be maintained by a receiver, either general or special. (*McLaughlin v. Kimball*, 908.)

12. CORPORATIONS, FOREIGN—RIGHT TO IMPOSE CONDITIONS—CONSTITUTIONAL LAW.—A statute requiring all foreign insurance companies to pay a tax on their business in the state, as a condition of their doing business therein, and imposing a higher tax on them than is imposed upon domestic insurers, is not a special or local law, nor is it in violation of constitutional provisions requiring that all laws of a general nature shall have a uniform operation, and that the general assembly shall not grant to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens. (*Scottish etc. Ins. Co. v. Herriott*, 548.)

13. CORPORATIONS, FOREIGN—RIGHT OF STATE TO EXCLUDE OR IMPOSE CONDITIONS.—A state may exclude a foreign corporation from doing business therein, and it is not prohibited from discriminating in the privileges it may grant to such corporation as a condition of its doing business within its limits. (*Scottish etc. Ins. Co. v. Herriott*, 548.)

14. CORPORATIONS, FOREIGN—TREATY RIGHTS.—A corporation organized in Great Britain, and having its principal place of business there, is not a subject thereof, within the meaning of a treaty giving subjects of that country the right to do business in any of the states of the United States on the same terms as natives. (*Scottish etc. Ins. Co. v. Herriott*, 548.)

15. FOREIGN CORPORATIONS—EMINENT DOMAIN.—A statute which confers on foreign corporations obtaining permits to do business in the state all the privileges enjoyed by domestic corporations, includes the right of eminent domain in condemnation proceedings. (*San Antonio etc. Ry. Co. v. Southwestern Tel. etc. Co.*, 84.)

See Assignment for Creditors, 3-5; Attachment, 4; Husband and Wife, 13; Taxes, 5, 6.

COSTS.

1. COSTS—RETAXATION OF—ERRONEOUS FINDING.—If two issues are presented, upon one of which there is a finding for the plaintiff, and upon the other an erroneous ruling for the defendant, and the court divides the costs, the cost of the trial of the latter issue should be retaxed in favor of the plaintiff. (*Bathgate v. Irvine*, 158.)

2. TRIAL—COSTS IN SPECIAL PROCEEDINGS.—In contempt proceedings to enforce a judgment, costs may be awarded to the prevailing party. (*Ahlers v. Thomas*, 820.)

3. JUDGMENTS—TORTS—COSTS.—If an action is in tort, judgment for the defendant for costs follows the complaint and is also in tort. (*Northern v. Hanners*, 74.)

4. EXEMPTIONS—COSTS—ACTION IN TORT.—If, in an action in tort, defendant recovers judgment for costs, plaintiff cannot claim his statutory exemption against the execution issued against him for such costs. (*Northern v. Hanners*, 74.)

COTENANCY.

See Adverse Possession, 2.

COURTS-MARTIAL.

1. CONSTITUTIONAL LAW—COURTS-MARTIAL—RIGHT OF ACCUSED TO COUNSEL.—Under a constitutional provision

that "in any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil cases," a person prosecuted for an offense before a court-martial organized under the laws of the state is guaranteed the right to defend by counsel. (*State v. Crosby*, 786.)

2. COURTS-MARTIAL—RIGHT OF ATTORNEY TO APPEAR BEFORE.—A statute forbidding, under penalty, any person to practice law in any court in the state, except justice's, recorder's, or a municipal court, without having received a license as attorney or counselor, limits the right of appearing as an attorney before courts-martial to those who have obtained the required license. (*State v. Crosby*, 786.)

3. COURTS-MARTIAL—RIGHT TO SUSPEND ATTORNEY.—A court-martial, or any other court other than the supreme court, has no power to suspend a licensed attorney in the exercise of his rights for any cause, or for any length of time. If the attorney's conduct is contemptuous before a court-martial, that court can avail itself of the remedy provided by statute, but it cannot suspend him or interrupt him in the exercise of his rights. (*State v. Crosby*, 786.)

4. COURTS-MARTIAL—MANDAMUS AS REMEDY TO ENFORCE RIGHT OF ATTORNEY TO APPEAR.—Mandamus is the proper remedy to enforce the right of a licensed attorney to appear for his client in a prosecution before a court-martial when such right is denied by that court. (*State v. Crosby*, 786.)

CREDITOR'S SUIT.

CREDITOR'S SUIT TO REACH EQUITABLE ASSETS—PLEADING—EVIDENCE.—In a creditor's suit brought to reach equitable assets which the debtor has fraudulently transferred, the plaintiff must allege and prove that he has no legal remedy, and that the debtor is insolvent, and has no other property from which his debt may be satisfied. The best, and, as a rule, the only, evidence of these facts is the return of an execution *nulla bona*. (*Spooner v. Travelers' Ins. Co.*, 651.)

CRIMINAL LAW.

CRIMINAL LAW—ASSENT OF OWNER AS DEFENSE TO CRIME.—A person who knows of a crime contemplated against him may remain silent and permit matters to go on, for the purpose of apprehending the criminal, without being held to have assented to the act. Such action on his part is no excuse for the crime. (*State v. Abley*, 520.)

See Burglary; Evidence, 10, 11; Former Acquittal; Witnesses, 8, 9.

CROSS-COMPLAINT.

See Pleading, 2; Setoff, 1-3.

COURTESY.

See Husband and Wife, 3-5.

DAMAGES.

1. DAMAGES.—FOR MENTAL SUFFERING which is the result of physical injuries, negligently inflicted, damages may be recovered. (*Gulf etc. Ry. Co. v. Hayter*, 856.)

2. DAMAGES—RECOVERY FOR FRIGHT.—There can be no recovery for mere fright neither attended nor followed by any other jury. (*Gulf etc. Ry. Co. v. Hayter*, 856.)

3. DAMAGES—FRIGHT FOLLOWED BY PHYSICAL INJURY.—Where a physical injury results from a fright or other mental shock, caused by the wrongful act or omission of another, the injured party is entitled to recover his damages, provided the act or omission is the proximate cause of the injury, and the injury ought, in the light of all the circumstances, to have been foreseen as a natural and probable consequence thereof. (*Gulf etc. Ry. Co. v. Hayter*, 856.)

See Negligence, 8, 4; Telegraph Companies, 10.

DEEDS.

1. DEEDS.—WHILE UNDER THE RULE IN SHELLEY'S CASE a conveyance to a grantee and his "bodily heirs," if not qualified, vests in such grantee an estate in fee simple, not because the grantor so intended, but because the law gives to the language that effect, yet the rule does not preclude a construction of the words "bodily heirs" so as to ascertain the grantor's intention. (*Simonton v. White*, 824.)

2. DEEDS—RULE IN SHELLEY'S CASE—WHEN NOT APPLICABLE.—In a deed by a father to a daughter and her "bodily heirs," in consideration of his love for her and her four named children, the land conveyed not to be sold, but its produce to go to the support of the daughter and her family during her life, and "at her death to be equally and impartially divided between her bodily heirs," the words "bodily heirs" mean children, the rule in Shelley's Case does not apply, and the daughter takes an estate for life only, with remainder in fee to her children after her death. (*Simonton v. White*, 824.)

3. DEEDS—RESTRAINT ON ALIENATION.—An estate for life may be vested in a married woman with a provision in restraint of alienation; hence where a deed conveying a life estate to a married woman expressly prohibits alienation, and creates in her a trust for the support of herself and children which is inconsistent with the power to convey, the children can recover the land from a grantee of such married woman and restore it to her. (*Simonton v. White*, 824.)

4. DEEDS—DELIVERY.—POSSESSION of a deed is *prima facie* evidence of delivery, although the deed is brought to the grantee by a person other than the grantor. (*Furenes v. Elde*, 545.)

5. DEEDS—DELIVERY.—THE PRESUMPTION that a deed was delivered on the date of its execution does not prevail when the record affirmatively shows that such deed did not reach the grantee until after the grantor's death. (*Furenes v. Elde*, 545.)

6. DEEDS—DEATH.—AGENCY TO DELIVER A DEED is dissolved by the death of the grantor unless otherwise provided. (*Furenes v. Elde*, 545.)

7. DEEDS—NAMES—IDEM SONANS.—The words "Waldimar" and "Waltimore" are not *idem sonans*; hence a deed signed by "Waldimar Arens," by virtue of a power of attorney executed to "Waltimore Arens," is not admissible in evidence without showing that "Waltimore" and "Waldimar" was the same person. (*Moore v. Allen*, 255.)

DEFINITIONS.

"*Bodily heirs.*" (Simonton v. White, 824.)

"*Privacy.*" (Ahlers v. Thomas, 820.)

DEPARTMENT STORES.

See License.

DOWER.

See Husband and Wife, 4.

EASEMENTS.

1. **PRIVATE WAYS—EASEMENT APPURTENANT TO LAND.** A bargain and sale deed containing no words of inheritance, executed by the owner of land, of a right of way across his farm, "to cross on foot or with team upon or near" a certain government line, is sufficiently definite as to the land to be used as a right of way, and creates an easement in the land of the grantor appurtenant to the land of the grantee, which the latter may transfer by grant of his land. (Lidgerding v. Zignego, 677.)

2. **EASEMENTS—APPURTENANT OR IN GROSS—PRESUMPTION—RIGHT OF WAY.**—An easement, such as a right of way, may be created by grant in gross, but this is never presumed when it can be fairly construed to be appurtenant to some other estate. An easement is appurtenant, and not in gross, when it appears that it was granted for the benefit of the grantee's land. A right of way is appurtenant to the land of the grantee, if so in fact, although not declared to be so in the deed. If the way leads to the grantee's land, and is useless except for use in connection with it, and is so used, it is appurtenant to it. (Lidgerding v. Zignego, 677.)

3. **EASEMENT—WHETHER APPURTENANT OR IN GROSS—HOW ASCERTAINED.**—Whether a grant of an easement is in gross or appurtenant to some other estate may be determined by the relation of the easement to such estate, or the absence of it, in the light of all the circumstances under which the grant was made. (Lidgerding v. Zignego, 677.)

EIGHT-HOUR LAW.

See Police Power, 3; Statutes, 16.

EJECTMENT.

EJECTMENT — ESTOPPEL. — Where the defendant in an ejectment suit bought the lands in good faith and went into possession, and for a long period of years exercised all the acts of ownership over them, and made valuable improvements thereon, and paid the taxes, with the knowledge of the plaintiffs, who during all that time claimed title to the premises, such plaintiffs are estopped from asserting title against the defendant, although the deeds under which she claims are void. (Shea v. Shea, 779.)

ELECTIONS.

1. **ELECTIONS—BALLOTS—DISTINGUISHING MARKS.**—Under a statute providing that no ballot shall be counted containing any mark or device whereby it may be identified as to who might have cast it, and also providing that any voter may alter or change his ballot by erasing any name therefrom, or by inserting in its

place, in writing or by paster, the name of any person other than the candidate named, the alteration of a ballot by erasing the name on a paster and restoring the name originally printed on the ballot, either by writing or by another paster, does not render the ballot void. (*Coughlin v. McElroy*, 301.)

2. ELECTIONS — BALLOTS — DISTINGUISHING MARKS.—Marks upon the face of ballots which appear or are shown to have been made accidentally, and not for the purpose of indicating the voter, and changes for the existence of which a reasonable explanation consistent with honesty and good faith, either appears upon the face of the ballot or is shown by proof, do not render the ballot void as containing distinguishing marks. (*Coughlin v. McElroy*, 301.)

3. ELECTIONS — BALLOTS — AMBIGUITY — EVIDENCE.—If there is no ambiguity upon the face of a ballot, the fact that it was intended to be cast for another person cannot be shown by extrinsic evidence. (*Coughlin v. McElroy*, 301.)

See Actions.

ELECTRIC COMPANIES.

NEGLIGENCE—PROXIMATE CAUSE—ELECTRIC WIRES. It is no evidence of negligence on the part of an electric company to suspend its uninsulated wires sixteen feet above the street over an awning, which served merely as a shade and protection to the front of the building, and which was not used as a place of resort either for pleasure or for business, since there is no reason to anticipate that persons will be injured thereby. (*Brush Electric etc. Co. v. Lefevre*, 898.)

EMBEZZLEMENT.

1. EMBEZZLEMENT BY PUBLIC OFFICERS—ELEMENTS NECESSARY FOR CONVICTION.—To authorize the conviction of a public officer for embezzlement, it must be shown that the accused is a public officer, or occupies a fiduciary relation; that the money or property which he is charged with appropriating to his own use came into his possession by virtue of his office or employment; and that he embezzled or fraudulently converted it to his own use. (*Robinson v. State*, 392.)

2. EMBEZZLEMENT BY PUBLIC OFFICERS.—EVIDENCE of a mere failure, on the part of a public officer, to pay over funds coming into his hands, is not sufficient to support a conviction for a fraudulent appropriation thereof. There must be other evidence from which it may be legitimately inferred that such failure was either in contemplation of a misappropriation, or was the consequence thereof. The guilty intent must be shown. (*Robinson v. State*, 392.)

EMINENT DOMAIN.

See Corporations, 15; Telegraph Companies, 7.

EQUITY.

See Executors and Administrators, 3, 4; Homestead, 13; Mistake; Mortgages, 1-3.

ESTATES OF DECEDENTS.

See Executors and Administrators.

ESTOPPEL.

See Ejectment; Husband and Wife, 3; Municipal Corporations, 2, 3

EVIDENCE.

1. EVIDENCE.—A CONSTRUCTION CONTRACT signed by the contractor only is admissible in evidence against the other party thereto in favor of a stranger after the contract has been fulfilled. (*Watson v. New Milford*, 345.)

2. EVIDENCE—PREVIOUS DEALINGS.—Where parties contract with reference to the provisions of previous dealings, the terms of such dealings may be shown in evidence in order to arrive at the intention of the parties; hence where a credit was given for premiums in previous insurance dealings, such dealings may be looked to in determining whether a cash payment or a credit was intended. (*Western Assur. Co. v. McAlpin*, 423.)

3. EVIDENCE—PROOF OF DECLARATIONS—WHEN PROPERLY EXCLUDED.—An offer to prove declarations of a defendant is properly excluded where the court has not been informed of the state of facts that such declarations are intended to prove. (*Bathgate v. Irvine*, 158.)

4. CONSTITUTIONAL LAW—PRODUCTION OF BOOKS AND PAPERS—SANCTITY OF PRIVATE RIGHTS.—To compel a person to deliver his books and papers to another, who does not claim any ownership in them, is to violate the sanctity of most important private rights, and is not to be tolerated except when warranted by some law clearly not inconsistent with that provision of the constitution which prohibits unreasonable seizures and searches. (*Ex parte Clarke*, 176.)

5. CONSTITUTIONAL LAW—PRODUCTION OF BOOKS AND PAPERS—WHAT SHOWING IS REQUIRED.—A party to a pending action has no right to call for the books, papers, and documents of his adversary merely for the purpose of entering into a "fishing examination" of them. To support their production, there must be a substantial showing that the book, paper, or document sought for contains material evidence in support of the cause of action or defense of the party asking for it. A mere suspicion that it contains such evidence does not warrant an order for its production. (*Ex parte Clarke*, 176.)

6. CONSTITUTIONAL LAW—PRODUCTION OF BOOKS AND PAPERS—ORDER VOID FOR WANT OF AFFIDAVIT.—An order of court to compel a witness to produce books and papers is unauthorized and void, where there is no showing, by affidavit or otherwise, that they contain any evidence material to the cause, especially where there is positive testimony that they do not contain such evidence. (*Ex parte Clarke*, 176.)

7. CONSTITUTIONAL LAW—PRODUCTION OF BOOKS AND PAPERS—COMMITMENT FOR CONTEMPT—HABEAS CORPUS.—A witness committed for contempt in disobeying an order of court requiring him to produce books and papers which he cannot be legally required to produce will be discharged on habeas corpus, for such an order is void. (*Ex parte Clarke*, 176.)

8. PRESUMPTION.—IT IS PRESUMED THAT THE COMMON LAW PREVAILS in states which are judicially known to be of common-law origin. (*Birmingham Water Works Co. v. Hume*, 43.)

9. EVIDENCE—RES GESTÆ.—DECLARATIONS made five and one-half hours after the happening of an accident are not

admissible as part of the *res gestae*. (*Purcell v. Chicago etc. Ry. Co.*, 557.)

1. **CRIMINAL LAW—EVIDENCE—PROOF OF RECORDS.**—The accused in a criminal case is not prejudiced by the introduction of the original records to prove an admissible fact merely because such proof should have been made by certified copy. (*State v. Haskins*, 560.)

11. **EVIDENCE—STATEMENT OF FACT OR CONCLUSION.**—Proof of who was acting as a certain county officer at a certain time may be made by the statement of a witness, without producing such officer's commission of office. Such statement by the witness is of a fact and not a conclusion. (*State v. Haskins*, 560.)

See Appeal; Bill of Lading; Bonds, 1; Execution, 15; Factors; Judgments, 6; Negligence, 5; Nuisance, 1, 2; Witnesses.

EXECUTION.

1. **EXECUTIONS—ISSUE PRIOR TO DOCKETING JUDGMENT.**—Execution issued before a judgment rendered and docketed in one county is docketed in another county, and reciting the docketing of the judgment in the latter county two days after such execution was issued, and two days after its date, is irregular, but not void; and such irregularity is cured by the subsequent docketing of the judgment in such other county at the time mentioned. (*Hoerr v. Melhofer*, 674.)

2. **EXECUTION ISSUED PREMATURELY** is not void, as such issue constitutes a mere irregularity. (*Christian & Craft etc. Co. v. Michael*, 30.)

3. **EXECUTIONS—IRREGULARITY IN ISSUE.**—A claimant in a trial of the right of property cannot complain of irregularity in the issuing of execution against the judgment defendant. (*Christian & Craft etc. Co. v. Michael*, 30.)

4. **EXECUTION SALE—UNRECORDED DEED.**—As between a purchaser at an execution sale and a purchaser at a sale upon the foreclosure of a mortgage which was unrecorded at the time the lien of the judgment creditor was acquired, the burden is upon the person asserting his right under the unrecorded mortgage to show that the judgment creditor had notice of such mortgage prior to the acquisition of his lien. (*Barnett v. Squyres*, 854.)

5. **EXECUTIONS—SALE OF MORE PROPERTY THAN DEFENDANT OWNS—VALIDITY—WHO CANNOT COMPLAIN.**—A defendant in execution, or one claiming under him, cannot complain that an execution sale is void on the ground that the levy and sale embraced more property than the defendant owned. (*Conley v. Redwine*, 398.)

6. **EXECUTIONS—SALE EN MASSE OF LAND WITHIN CORPORATE LIMITS.**—Although the owners of land within the limits of an incorporated town have caused a map thereof to be made, on which streets and lots of the usual size appear, yet if there is evidence from which the jury may find that the streets and town lots have not been actually laid out over the property, that the same is really one tract and used as such, and that the only thing in the nature of a street through it is a recognized public road of the county, a levy of execution upon, and sale of, the property as a whole is not illegal. (*Conley v. Redwine*, 398.)

7. **EXECUTIONS—SALES ON—INSUFFICIENT DESCRIPTION IN LEVY—HOW CURED.**—An entry of levy which embraces in general terms a description of a tract of land levied on, and re-

fers for a more accurate description to a public record, is sufficient if the public record accurately describes the property; and this is true although the description might be insufficient to locate the property in the absence of the record. (Conley v. Redwine, 398.)

8. EXECUTIONS—SALES EN MASSE.—Land in a body, but made up of contiguous parcels composed of fractional parts of different land lots, may be levied upon as a whole and sold as one tract, particularly where the owner has treated the property as one tract, so far as the land lot lines are concerned. (Conley v. Redwine, 398.)

9. EXECUTIONS—MISCONDUCT IN DETERRING BIDDERS AT SALE—EFFECT OF, ON RIGHT TO ATTACK SALE.—A person who is interested in whatever surplus there may be from the proceeds of an execution sale, after the payment of the execution, should not be prejudiced by the misconduct of a stranger in deterring bidders and depressing the price of the property, but if such interested person co-operates with the stranger in such misconduct this would prevent him from attacking the sale on the ground that the property did not bring its full value. (Conley v. Redwine, 398.)

10. EXECUTIONS—DETERRING BIDDERS AT SALE—WHAT IS NO CAUSE FOR SETTING SALE ASIDE.—If no one is actually deterred from bidding at an execution sale, the mere fact that a principal and his agent bid against each other thereat is no cause for setting the sale aside, whatever their intention may have been. (Conley v. Redwine, 398.)

11. EXECUTIONS—SHERIFF'S SALE—NOTICE OF—WHEN INSUFFICIENT.—Under a law providing that notices of all sales by a sheriff "shall be published weekly for four weeks," and that there must be "one insertion each week for each of the four weeks immediately preceding" the day when the sale is to take place, an execution sale is not properly advertised where there are not four insertions in four consecutive weeks immediately preceding the week in which the sale takes place. The publication is insufficient if the last one is made in the same week as that in which the sale is to be had. (Conley v. Redwine, 398.)

12. EXECUTIONS—SHERIFF'S SALE—DEFECT IN ADVERTISING—VALIDITY OF SALE.—A failure to advertise a sheriff's sale on execution for the length of time prescribed by law is a mere irregularity, and does not affect the validity of such a sale made to an innocent purchaser, having no notice of the defect, although he is the plaintiff in execution. (Conley v. Redwine, 398.)

13. EXECUTIONS—VOID SALE AS OBSTACLE TO VALID SALE.—A void sale under a dormant execution presents no obstacle to a sale of the same property under a valid execution. It is not necessary that the void sale be set aside by a direct proceeding before another sale is had. (Conley v. Redwine, 398.)

14. EXECUTIONS.—PERSONALTY AFFIXED TO REALTY under a contract with the owner of the land that it shall remain the property of the person affixing it, is subject to execution against him, and may be the subject of conversion. An execution purchaser is not deprived of his right in it, or his right of action for conversion, by delay in asserting such right, short of the statutory bar. (Broadus v. Smith, 61.)

15. EXECUTIONS—PAROL EVIDENCE TO IDENTIFY LEVY. Parol evidence is admissible to identify vault doors and iron partitions as being the same property described in the sheriff's return on an execution, as "two doors and frames." (Broadus v. Smith, 61.)

16. EXECUTIONS—SALES—COLOR OF TITLE.—The purchaser's certificate of sale under execution shows color of title in him. (*Nesbitt v. Delamar's etc. Min. Co.*, 807.)

EXECUTORS AND ADMINISTRATORS.

1. EXECUTORS AND ADMINISTRATORS—LIABILITY OF DECEDENT'S ESTATE FOR ATTORNEY'S SERVICES PRIOR TO EXECUTOR'S APPOINTMENT.—An attorney at law who renders services, directly connected with the settlement of a decedent's estate, to an executor named in the will before he actually qualifies as such executor, is entitled to collect his fees for such services in the same manner as other claims against the decedent's estate are collected. (*Baker v. Cauthorn*, 443.)

2. JUDICIAL SALES—DEFECTIVE DESCRIPTION OF LAND—CORRECTION.—If the description of land which an administrator is licensed by the probate court to sell is definite and certain, both in the license and all other records of the court in connection with the sale, and clearly identifies land which the deceased never owned, and no other, the administrator's sale is valid, although his deed correctly describes the land of his intestate, and an order of the probate court, made many years thereafter, purporting to correct its records so as to describe the land of which the intestate died seised, is also void. (*Hanson v. Ingwaldson*, 692.)

3. EQUITY—JURISDICTION IN PROBATE.—An executor may maintain a bill in equity against his coexecutor for the purpose of having the amount determined and to enforce a claim held by the estate against such coexecutor, arising on a contract entered into with the testator in his lifetime, and due at the time of his decease, when the coexecutor disputes the amount and refuses to pay. (*Peterson v. Vanderburgh*, 671.)

4. EQUITY—JURISDICTION IN PROBATE.—Equity may entertain an action brought by one executor against his coexecutor on the part of the estate to determine the amount of a disputed claim, or to force an account, or to foreclose a mortgage, or in any other case where justice requires it and there is no remedy at law. (*Peterson v. Vanderburgh*, 671.)

EXEMPTIONS.

See Costs.

FACTORS.

1. FACTORS—EVIDENCE AS TO PRICES.—IF COMMISSION MERCHANTS are obligated not to sell raisins below prices named by an association of raisin growers, and an action is brought involving a breach of contract on their part, the introduction in evidence of a published schedule of prices fixed by the association, whether erroneously admitted or not, is cured by evidence subsequently admitted, without objection or contradiction, that the prices shown in such publication were those fixed on a certain date by the association. (*Mackenzie v. Hodgkin*, 209.)

2. FACTORS—EVIDENCE OF HIGHEST MARKET PRICE.—If raisins are to be delivered at a certain place to commission merchants, who bind themselves in writing to use their best endeavors to obtain the "highest market price" for them, the merchants may sell the raisins at that place, or elsewhere, but evidence of the market price in an action involving a breach of contract on their part, is not confined to the place where the raisins are actually sold. The highest market price prevailing at the place of delivery may

be shown, whether the merchants were or were not negligent in failing to sell at that place. (*Mackenzie v. Hodgkin*, 209.)

3. FACTORS—RELEASE FROM CONTRACT TO SELL FOR CERTAIN PRICE.—COMMISSION MERCHANTS, under a contract obligation not to sell raisins below prices named by an association of raisin growers, without consulting the owner, are not released from their promise by evidence that the association, soon after the making of the contract, collapsed, and abandoned their agreed schedule of prices, and thereafter had no fixed prices, the members of the association then selling at what rates they pleased. (*Mackenzie v. Hodgkin*, 209.)

4. CONTRACTS IN WRITING—MODIFYING BY PAROL—ILLUSTRATION.—If a vineyardist agrees in writing that commission merchants shall sell his entire crop of raisins upon commission, he cannot, in an action involving a breach of contract upon their part, prove a subsequent oral sale to them, for a fixed price, of a quantity of a certain kind of raisins included in the written contract, where there is no proof that any payments were made upon such oral sale, or that anything was done by the vineyardist which he was not bound to do in fulfillment of the written contract. (*Mackenzie v. Hodgkin*, 209.)

5. SALES BY CONSIGNEE, WHEN VOID.—If a consignee of goods, in violation of the contract of consignment and out of the usual course of business, transfers to another, the consignor is entitled to retake his property, notwithstanding it may have been so transferred to an innocent purchaser for value. (*Romeo v. Martucci*, 327.)

6. SALES—CONSIGNMENT OF GOODS ON COMMISSION—RIGHT OF CONSIGNOR TO RETAKE.—Under a contract of consignment of goods for sale on commission, the consignor is not estopped from setting up his title as against an innocent purchaser of the goods from the consignee, when such purchaser buys them on the same day that they are received as part of his purchase of the entire stock of goods and business of the consignee. (*Romeo v. Martucci*, 327.)

FEDERAL COURTS.

See Judgments, 7, 8; Process.

FELLOW-SERVANTS.

See Master and Servant, 2-11.

FIXTURES.

FIXTURES—WHAT ARE NOT.—If the owner of real estate, either orally or by writing, contracts or agrees with his tenant that he may erect or affix anything on the realty, and that the thing affixed shall remain his tenants and be removed by him, such article never becomes a fixture, but remains the personal property of the tenant, and may be removed by him. (*Broadbuss v. Smith*, 61.)

See Mortgages, 9, 10.

FORGERY.

1. FORGERY—INDICTMENT—SUFFICIENCY OF—"FORGE"—SIGNIFICATION OF.—While the gist of the crime of forgery is the intent to defraud, it is not necessary that the facts showing that intent should be specifically set out in an indictment for such crime, further than is included in the words "did feloniously forge" the instrument therein named. The word "forge," in such an in-

dictment, is not a mere legal conclusion, but includes, in and of itself, a statement of the particular acts which constitute the crime. (State v. Greenwood, 632.)

2. FORGERY—CHARGING IN LANGUAGE OF THE STATUTE.—In a statutory indictment for forgery it is sufficient to charge the crime in the words of the statute. (State v. Greenwood, 632.)

3. FORGERY—INDICTMENT FOR—WHEN SUFFICIENT—ILLUSTRATION.—If an indictment charges that, on a certain day, at a certain place, the defendant, "with intent to defraud," did then and there feloniously "forge" a certain promissory note of the tenor following, and then sets it out in full, a "public offense" is charged, "in plain and concise language," and the defendant is sufficiently informed "of the nature and cause of the accusation against him," as required by law. (State v. Greenwood, 632.)

FORMER ACQUITTAL

1. CRIMINAL LAW—INTOXICATING LIQUORS—FORMER ACQUITTAL.—The proprietor of a saloon who permits two or more persons at the same time to be in his saloon during prohibited hours cannot be prosecuted for a separate offense as to each of such persons, under a statute making it a crime for the proprietor to permit "any person or persons other than himself and family" to go into such saloon during prohibited hours. (State v. Rosenbaum, 432.)

2. CRIMINAL LAW—FORMER ACQUITTAL.—A prosecution for any part of a single crime bars any further prosecution based upon the whole or a part of the same crime. (State v. Rosenbaum, 432.)

FRAUDULENT CONVEYANCES.

1. FRAUDULENT CONVEYANCES—BURDEN OF PROOF—HOW SHIFTED.—If a plaintiff attacks a conveyance as in fraud of his rights, it is incumbent upon him first to show the fraudulent intent of the vendor. The burden then shifts to the purchaser to show a valuable consideration, and, this shown, the burden again shifts to the plaintiff, who must show the vendee's knowledge of the fraudulent intent of the vendor. (Hart v. Church, 195.)

2. FRAUDULENT CONVEYANCES TO WIFE.—Where a husband owns the reversionary interest in lands in which his wife owns the life interest, and, after expending large sums of money in improving them, conveys his interest to his wife, completely depriving himself of the ability to pay his debts, such conveyance is fraudulent and void as to his creditors. (Morris v. Fletcher, 87.)

3. FRAUDULENT CONVEYANCES—LIEN OF JUDGMENT.—A judgment creditor has no lien upon lands fraudulently conveyed by the debtor prior to the rendition of his judgment. Hence, a junior judgment creditor who first files his bill to set aside the fraudulent conveyance secures a first lien upon such property superior to that of any other judgment creditor. (Doster v. Manistee National Bank, 116.)

4. FRAUDULENT CONVEYANCES—VOIDABLE ONLY.—Under a statute which provides that every conveyance of an interest in lands made to hinder, delay, or defraud creditors shall be void as against creditors and purchasers, such conveyance is not void per se, but only voidable. It carries the legal title subject only to defeasance by the creditors and purchasers. (Doster v. Manistee National Bank, 116.)

5. FRAUDULENT CONVEYANCE—ACTION BY LIEN HOLDER TO SET ASIDE—PLEADING—EVIDENCE.—When a

with notice of a prior recorded mortgage executed by her husband and misdescribing the property, nor by the fact that the parties to the mortgage intended to embrace therein the property covered by the declaration of homestead. (Adams v. Baker, 799.)

13. HOMESTEAD—REFORMATION OF MORTGAGE AS AGAINST SUBSEQUENT DECLARATION.—Equity cannot reform a mistake in a mortgage on community property executed by the husband, as against his wife, who has filed a declaration of homestead on such property, without notice of the defective mortgage. (Adams v. Baker, 799.)

14. HOMESTEAD—MORTGAGE OF—EXECUTION AND VALIDITY.—A mortgage upon a homestead is not valid unless the instrument has been jointly and concurrently executed by both husband and wife. A mortgage upon a homestead executed by a wife alone is a nullity. (Hart v. Church, 195.)

15. HOMESTEAD—MORTGAGE OF, BY WIFE ALONE—VALIDITY.—A mortgage upon a homestead, executed by a wife alone, and recorded as her mortgage, acquires no validity from the fact that her husband, several months afterward, indorsed upon the mortgage a statement that he joined and concurred therein as of the date when it was executed, although such statement is signed and acknowledged, and part of record. (Hart v. Church, 195.)

16. HOMESTEAD—MORTGAGE OF, BY WIFE ALONE—PROCUREMENT BY FRAUD—VALIDITY.—A mortgage upon a homestead, executed by a wife alone, is a void instrument, regardless of the question of fraud in its procurement. (Hart v. Church, 195.)

HUSBAND AND WIFE

1. A CONTRACT TO PROMOTE THE DISSOLUTION OF A MARRIAGE is contrary to the policy of the law, illegal and void. Hence, a contract whereby a wife, who has resolved to leave her husband, agrees, for a stated consideration, to relinquish all claims on him as wife, provided a divorce is granted to him on or before a fixed date, is void, and is no bar, after his death, of her right to a year's support and dower. (Birch v. Anthony, 379.)

2. HUSBAND AND WIFE—AGREEMENT FOR SEPARATION.—A contract entered into between husband and wife, who are living apart by mutual consent, whereby the husband agrees to pay to his wife a certain sum each month for her support, is without consideration and cannot be enforced. (Scherer v. Scherer, 437.)

3. HUSBAND AND WIFE—AGREEMENT OF SEPARATION—CURTESY—ESTOPPEL.—A contract entered into between husband and wife, whereby he was to pay her a certain sum of money and she was to join him in deeds of conveyance and to relinquish her dower in other lands, and both were to live separately, and absolve each other from all obligations as husband and wife, and not enforceable at law, may, after complete performance, be successfully interposed as an equitable defense to an action brought by him to secure possession, as tenant by the curtesy, of property which she subsequently acquired with her own means, although it was not her separate, equitable estate. (McBreen v. McBreen, 758.)

4. HUSBAND AND WIFE—DOWER AND CURTESY—CONTRACT.—A wife may contract for the relinquishment of her dower right in her husband's land in consideration of a tract of land deeded by him to her, and he may make a similar contract with his wife in respect to his interest by the curtesy in land which she then owns or which she may afterward acquire. (McBreen v. McBreen, 758.)

6. HUSBAND AND WIFE—DEED TO WIFE—CURTESY.—In equity an estate may be so limited as to give a wife the inheritance and, by words clearly denoting that intention, to exclude and deprive her husband of curtesy. Hence a deed to a wife granting property "to her sole and separate use, free and clear of any and all marital rights of her present or any husband she may have hereafter," secures to her not merely the rents, issues, and profits in her lifetime, but deprives her husband of all curtesy in the land after her death. (*McBreen v. McBreen*, 758.)

6. HUSBAND AND WIFE—ANTENUPTIAL AGREEMENT—STATUTE OF FRAUDS.—Antenuptial agreements to convey land are included in those which, by the statute of frauds, must be in writing; but where a woman has been induced to enter into a contract of marriage by an oral promise on the part of the man to convey lands to her, which promise he fails to perform, the result is such a fraud upon her as will take the promise to convey out of the statute of frauds, and, as between them, equity will enforce the contract. (*Moore v. Allen*, 255.)

7. HUSBAND AND WIFE—ACTION FOR SEPARATE MAINTENANCE.—Where a husband refuses to support his wife, without fault upon her part, she may maintain an action for separate maintenance, without suing for divorce. (*In re Popejoy*, 222.)

8. HUSBAND AND WIFE—ABILITY TO PAY JUDGMENT FOR SEPARATE MAINTENANCE—HABEAS CORPUS.—Where a husband is committed for contempt of court because of his failure to pay a judgment for the separate maintenance of his wife, upon habeas corpus proceedings, where the evidence upon which the commitment is based is not before the court, it will be presumed that the court which issued the order of commitment found from the evidence that the husband had property with which to satisfy the judgment of his wife. (*In re Popejoy*, 222.)

9. HUSBAND AND WIFE—COMMITMENT FOR CONTEMPT—HABEAS CORPUS.—Where a husband has been committed for contempt, for his failure to pay a judgment against him for separate maintenance in favor of his wife, the question as to whether the evidence is sufficient to justify the commitment cannot be raised in habeas corpus proceedings, but must be presented by writ of error. (*In re Popejoy*, 222.)

10. HUSBAND AND WIFE—PROPERTY RIGHTS.—As between husband and wife, their rights in personal property coming to her attach under and are governed by the law of the place where they are domiciled at the time the property is received. (*Birmingham Water Works Co. v. Hume*, 43.)

11. HUSBAND AND WIFE—CHOSSES IN ACTION.—At common law, a husband is entitled, during coverture, to receive and to reduce to his possession and ownership all choses in action belonging to his wife at the time of the marriage, or which may accrue to her while the coverture continues. (*Birmingham Water Works Co. v. Hume*, 43.)

12. HUSBAND AND WIFE—CHOSSES IN ACTION—ASSIGNMENT.—A husband may, during the coverture, for a valuable consideration, assign the choses in action of his wife, which are capable of being immediately reduced to possession, so as to vest at least the beneficial ownership in the purchaser. (*Birmingham Water Works Co. v. Hume*, 43.)

13. HUSBAND AND WIFE—WIFE'S CORPORATE STOCK—ASSIGNMENT BY HUSBAND.—Shares in the capital stock of a corporation belonging to a wife are choses in action and may be

assigned for value by her husband without her concurrence or act of transfer. (*Birmingham Water Works Co. v. Hume*, 43.)

14. HUSBAND AND WIFE—IMPROVEMENTS ON WIFE'S PROPERTY—RIGHTS OF CREDITORS.—Where a husband expends large sums of money in the permanent improvement of his wife's property, thus rendering himself insolvent, such money may be treated by his creditors as a charge upon the lands for debts existing at the time the improvements were made. (*Morris v. Fletcher*, 87.)

15. HUSBAND AND WIFE—ACTION BY WIFE.—A HUSBAND is not a necessary party to an action brought by his wife in protection of her homestead right. (*Hart v. Church*, 195.)

See *Fraudulent Conveyances*, 2; *Homestead*; *Mechanics' Liens*, 8; *Witnesses*, 3-5, 10.

IDEM SONANS.

See *Deeds*, 7.

INDICTMENT.

See *Forgery*.

INFANTS.

1. INFANTS—JURISDICTION OVER—SERVICE OF PROCESS.—Infants must be served with process the same as adults, and unless so served in the manner provided by law the court has no jurisdiction over them, and the appointment of a guardian ad litem for them, without such service, is void and the proceedings thereupon coram non iudice. (*Westmeyer v. Gallenkamp*, 747.)

2. MINORS—DISAFFIRMANCE OF CONTRACT.—A minor is not required, as a condition of disaffirming his conveyance of land and recovering the same, to restore a consideration received for it which was not in his possession or control when he arrived at full age, but which had been wasted by him during his minority. (*Bullock v. Sprowls*, 849.)

3. MINORS — DISAFFIRMING CONTRACT — RESTORING CONSIDERATION.—One disaffirming his deed on the ground that it was executed when he was a minor must restore the consideration if it is still in his possession or within his control, or if he has used it during minority for purposes for which the law would permit him to charge his estate, as for necessities. (*Bullock v. Sprowls*, 849.)

See *Adverse Possession*, 3; *Process*, 2, 3.

INJUNCTIONS.

1. INJUNCTION AGAINST STREET IMPROVEMENT.—Equity will enjoin the exercise of an unauthorized power. Hence, an abutting property owner is entitled to an injunction against so much of a proposed street improvement as is unauthorized by law. (*Adams v. Shelbyville*, 484.)

2. INJUNCTIONS.—The granting, or refusal to grant, an injunction rests in the sound discretion of the trial court, and its action cannot be disturbed in the absence of clear proof of an abuse of such discretion. (*Platt v. Waterbury*, 835.)

3. CONSTITUTIONAL LAW—INJUNCTION AGAINST GOVERNOR.—When the governor of a state, in pursuance of his executive

authority, recognizes an act as legal, and is proceeding to execute its provisions, the courts cannot directly interfere with the discharge of his duties under it, merely because it is alleged that such act is unconstitutional. (*Frost v. Thomas*, 259.)

See Judgments, 3; Municipal Corporations, 26.

INSANE PERSONS.

1. **INSANE PERSONS—CONTRACTS OF—VALIDITY.**—The executed contract of an insane person who was not under guardianship at the time of its execution is voidable only, and not void. (*Aetna Life Ins. Co. v. Sellers*, 481.)

2. **RELEASE BY INSANE PERSON—DISAFFIRMANCE AS CONDITION PRECEDENT TO RIGHT OF ACTION.**—If a cross-complainant, an insane person not under guardianship, asks the foreclosure of a mortgage, which is affirmatively shown by his pleading to have been released by him, but no disaffirmance is pleaded, though grounds therefor are disclosed, the release must stand as a voidable executed contract, not a void one. Hence, the cross-complaint discloses no right of action. (*Aetna Life Ins. Co. v. Sellers*, 481.)

INSTRUCTIONS.

1. **INSTRUCTIONS—WHEN NOT PREJUDICIAL—HISTORY OF LITIGATION.**—It is not prejudicial for a judge to inform the jury as to the history of a protracted litigation, if it is derived from the pleadings in the case and from uncontradicted evidence, and the judge refers to it only so far as it is necessary to enable the jury to understand the issues involved in the present case. (*Conley v. Redwine*, 398.)

2. **INSTRUCTIONS—MISLEADING AND IRRELEVANT.**—Instructions which tend to mislead are erroneous, but all irrelevant instructions are not misleading. Thus, an incomplete instruction apparently outside the issues is not misleading, where the jury have been fully instructed as to the law applicable to the facts in the case. (*George v. Los Angeles Ry. Co.*, 184.)

3. **INSTRUCTIONS UPON IRRELEVANT QUESTION—EFFECT OF, UPON OTHER INSTRUCTIONS.**—In an action against a street railway company for injuries occasioned to a boy while playing around and with trailer-cars, left on a street by the company, an instruction that the right to so use the street must come from the city, which is an irrelevant and immaterial question, does not weaken the force of other instructions as to the care required of the defendant in so occupying the street. (*George v. Los Angeles Ry. Co.*, 184.)

4. **INSTRUCTIONS—INCONSISTENCIES.**—A party cannot complain of an instruction which is a correct statement of the law, although it is not consistent with other instructions given, which were more favorable to him. (*George v. Los Angeles Ry. Co.*, 184.)

See Appeal; Railroads, 16.

INSURANCE.

1. **INSURANCE—STATEMENT OF OWNERSHIP—NOTICE TO INSURER.**—A statement by an insured in an application for insurance that he was the sole owner of the property, though the property was not in his name, when in fact he was neither the legal nor equitable owner of the property, is not sufficient notice to put

the insurance company on inquiry by which it could have learned the facts, and does not prevent it from claiming a forfeiture of the policy because such answer is untrue. (*Planters' Mutual Ins. Co. v. Loyd*, 136.)

2. **INSURANCE CONTRACT—FORFEITURE.**—A clause in an insurance policy which contains a forfeiture is strictly construed against the insurer. (*Arkansas Fire Ins. Co. v. Wilson*, 129.)

3. **INSURANCE—AVOIDING POLICY—CHANGE OF INTEREST.**—Under the provisions of a fire insurance policy that it should be void "if the interest of the assured became other than the entire, unconditional, unencumbered, and sole ownership," the policy is not avoided because the insured entered into an executory contract in writing to sell, where no deed passed and no possession was given. (*Arkansas Fire Ins. Co. v. Wilson*, 129.)

4. **INSURANCE—CONDITION SUBSEQUENT—CONSTRUCTION.**—If a policy of fire insurance covers several items, and there is a breach of a condition subsequent as to one of them, it does not necessarily follow that the policy is avoided as to all. The nature and character of the condition and the purpose to be accomplished, as well as the equity of the case, are to be considered. If nothing but injustice can be accomplished by the enforcement of such condition, it cannot be presumed that the parties contracted with that intention as to that particular item insured. (*Hanover Fire Ins. Co. v. Crawford*, 55.)

5. **INSURANCE—CONDITION SUBSEQUENT.**—A provision in an insurance policy that the insured shall take an inventory of the goods insured at stated times, and keep his books and such inventory in an iron safe, or in some place not exposed to fire likely to destroy the building insured, and that a failure to observe this condition avoids the policy, imposes a condition subsequent. (*Hanover Fire Ins. Co. v. Crawford*, 55.)

6. **INSURANCE—SEVERABLE CONDITIONS.**—If a policy of fire insurance is issued on a store building, stock of merchandise, and store and office furniture and fixtures, in separate and distinct sums, and provides that the insured shall take an inventory of stock at stated times, and keep his books and such inventory in an iron safe, or in some place not exposed to fire likely to destroy the building insured, and that a failure to observe this condition shall avoid the policy, such condition does not apply to the building and fixtures so that a breach of it defeats a recovery for their loss, in case the whole of the property is destroyed by fire. (*Hanover Fire Ins. Co. v. Crawford*, 55.)

7. **INSURANCE—EVIDENCE—PRIOR POLICY.**—In an action upon an oral contract to insure certain property for the same amount and on the same terms as stated in a former policy issued upon the same property, the former policy is admissible in evidence. (*Western Assur. Co. v. McAlpin*, 423.)

8. **INSURANCE—PROOFS OF LOSS—WAIVER.**—Where an insurance company denies its liability for loss by fire, proofs of loss are not required as a condition precedent to bringing suit. (*Western Assur. Co. v. McAlpin*, 423.)

9. **INSURANCE—FOUNDATION OF ACTION.**—In an action against an insurance company for loss by fire, upon an oral agreement to insure, the policy agreed to be issued is not the foundation of the action in the sense that it must be filed with the complaint. (*Western Assur. Co. v. McAlpin*, 423.)

10. **INSURANCE.**—A CONTRACT OF INSURANCE MAY REST IN PAROL if all the elements essential to a valid contract are

agreed upon. Hence a contract of insurance is established where an agent, with authority to receive applications for insurance and accept risks, agrees to insure certain property, and the time when the risk should begin, the amount of the risk, its duration, the premium, and the kind of policy to be issued were all fixed, and nothing remained to be determined afterward, though the premium was not paid, the agent being indebted to the insured and having on previous occasions issued policies to the insured crediting the premium on account. (*Western Assur. Co. v. McAlpin*, 423.)

11. **INSURANCE—ORAL CONTRACT.—A COURT OF EQUITY** will enforce an oral contract for a policy of insurance, and, having jurisdiction for specific enforcement, adjudge the damages just as if the policy had been issued and suit brought thereon. (*Western Assur. Co. v. McAlpin*, 423.)

12. **INSURANCE — BINDING CONTRACT — PAYMENT OF PREMIUM.**—Where an insurance agent enters into a contract to insure property, crediting the premium on an account which the agent owed the insured, the contract is binding on the company. (*Western Assur. Co. v. McAlpin*, 423.)

13. **INSURANCE.—A CONTRACT** of insurance, or to insure, may exist without either the payment of the premium or the delivery of the policy. (*Western Assur. Co. v. McAlpin*, 423.)

14. **INSURANCE—FORFEITURE—WAIVER.**—When an insurer, with knowledge of any act on the part of the insured which works a forfeiture, enters into negotiations with him which recognize the continued validity of the policy, and thus induces him to incur expense or trouble under the belief that his loss will be paid, the forfeiture is waived. (*Planters' Mutual Ins. Co. v. Loyd*, 136.)

15. **INSURANCE — FORFEITURE ON ONE GROUND — WAIVER.**—An act by an insurer which waives one ground of forfeiture will not affect another ground of forfeiture of which the insurer was ignorant. (*Planters' Mutual Ins. Co. v. Loyd*, 136.)

16. **INSURANCE—WAIVER OF FORFEITURE.—THE BURDEN** of showing the waiver of a forfeiture by an insurer is on the insured. (*Planters' Mutual Ins. Co. v. Loyd*, 136.)

17. **INSURANCE—FORFEITURE OF POLICY—STATEMENT OF OWNERSHIP.**—Where an insured states in his application that he is the sole owner of property, when in fact it is owned by his wife, the policy is forfeited, under a stipulation that if this answer was untrue, or his interest any other than a perfect legal and equitable ownership, the policy should be void. (*Planters' Mutual Ins. Co. v. Loyd*, 136.)

18. **INSURANCE—LIFE—DELIVERY OF POLICY.**—The deposit of a life insurance policy in the mails, addressed to the insured, is a delivery to him, although he dies after it is so deposited and before receiving it. (*Triple Link etc. Assn. v. Williams*, 34.)

19. **INSURANCE—DELIVERY OF POLICY—PLEADING.**—An averment in a pleading that a policy of insurance was signed and sealed by the insurer, and deposited in the mail, sufficiently alleges that it was so deposited by the insurer, and therefore that there was a delivery of the policy to the insured by its deposit in the mail. (*Triple Link etc. Assn. v. Williams*, 34.)

20. **INSURANCE—LIFE—MISREPRESENTATION IN APPLICATION—KNOWLEDGE OF AGENT.**—If an applicant for life insurance states, in answer to a question by the insurance agent who fills the application, that his occupation is that of "foreman," but the agent writes "foreman of railroad yard," with full knowledge

that the occupation of the applicant is that of foreman of a switching crew in a railroad yard, the company cannot avoid the policy on the ground of misrepresentation, in the absence of fraud, when the applicant is aware of the knowledge of the agent as to his occupation, and is without fault in making the statement. Under such facts, the knowledge of the agent is regarded as the knowledge of the insurer. (Triple Link etc. Assn. v. Williams, 34.)

21. INSURANCE — LIFE — MISREPRESENTATION — KNOWLEDGE OF AGENT — WAIVER OF CONDITION.—An insurance company, by issuing a life policy to a foreman of a switch gang in a railway yard, when its agent who filled in the application had full knowledge of the occupation of the applicant, and stated an occupation less dangerous than the real one in the application without the fault of the applicant, waives a stipulation in the policy against the assured engaging in a hazardous employment or occupation. (Triple Link etc. Assn. v. Williams, 34.)

22. INSURANCE — LIFE — MISREPRESENTATIONS — FOLLETTURE.—If an applicant for life insurance falsely and intentionally states in his application that he is foreman of a railroad yard, when in reality he is foreman of a switch gang in such yard, a much more hazardous occupation, such misrepresentation avoids the policy issued thereon, although the agent taking and filling the application knew of the falsity of the statement at the time he sent the application to his company. In such case the agent must be regarded as being in collusion with the applicant or as being induced by him to get such false statement before the insurer. (Triple Link etc. Assn. v. Williams, 34.)

23. INSURANCE — LIFE — PLEADING.—A complaint in an action on a policy of life insurance which sets out the policy need not aver that defendant has money in its mortuary fund sufficient to pay the loss, nor set out the representations, agreements, and warranties referred to in the policy, and aver that such representations are true, and that the agreements and warranties have been kept and complied with. These are matters of defense, as is also the failure of the insured to pay assessments and mortuary calls (Triple Link etc. Assn. v. Williams, 34.)

24. INSURANCE — LIFE — PLEADING PROOFS OF DEATH. In an action on a policy of life insurance an averment in the complaint that the money claimed is due is not subject to demurrer for its failure to aver in terms that satisfactory proofs of the death of the assured were made ninety days before the bringing of the suit. If proof of death was not furnished seasonably before suit, it was matter for plea in abatement. (Triple Link etc. Assn. v. Williams, 34.)

25. INSURANCE UPON ONE'S OWN LIFE FOR ANOTHER'S BENEFIT IS VALID.—A person has an insurable interest in his own life and may lawfully insure it for the benefit of anyone whose interests he desires to promote, although the latter has no insurable interest in the life of the former. (Union Fraternal League v. Walton, 350.)

26. INSURANCE UPON ONE'S OWN LIFE FOR ANOTHER'S BENEFIT — RIGHT OF BENEFICIARY TO RECOVER.—If one obtains a contract of insurance on his own life, and keeps up the same out of his own means, and directs the amount of the policy to be paid at his death to another whom, from love, friendship, or any other reason, he desires to benefit, the beneficiary named is entitled to recover on such contract, although it may not be shown that the beneficiary had any other insurable interest in the life of

he deceased than existed in his goodwill and emanated from his expressed wish to benefit. (*Union Fraternal League v. Walton*, 350.)

27. INSURANCE—MUTUAL BENEFIT SOCIETIES—RIGHT OF BENEFICIARY TO RECOVER.—A beneficiary, named by a member of a fraternal or benevolent association which provides for life insurance, is entitled, after the death of such member, to recover the amount of the benefit without showing any insurable interest in the life of the deceased. (*Union Fraternal League v. Walton*, 350.)

28. INSURANCE—MUTUAL BENEFIT SOCIETIES—CONTRACT OF—WHAT CONSTITUTES.—A contract entered into by a benefit society with a member is executory, and its charter, constitution, and by-laws necessarily form a part of the contract, which is, however, ordinarily manifested by the certificate of membership. (*Union Fraternal League v. Walton*, 350.)

29. INSURANCE—MUTUAL BENEFIT SOCIETIES—BENEFICIARIES—RIGHT TO DESIGNATE.—If a member of a benefit society, which provides for life insurance, takes out a policy on his own life, he may designate therein whomsoever he pleases as beneficiary, where there is nothing in the charter or by-laws of the organization, or in the statutes of the state, restricting the appointment, and his right to do so cannot be questioned. (*Union Fraternal League v. Walton*, 350.)

30. INSURANCE—POLICY—WARRANTY.—An insurance application with answers to questions, the medical examiner's report, and an agreement, which recites that the preceding statements and answers, the application, and this agreement are made part of the policy, form a part of the insurance contract, and an agreement therein of the insured that he would abstain from the excessive use of intoxicating liquor is a promissory warranty and not the statement of an expectation. (*Northwestern etc. Assn. v. Bodurtha*, 414.)

31. INSURANCE—BREACH OF WARRANTY—WAIVER—PLEADING.—In an action on a life insurance policy, where, to a defense that there has been a breach of certain warranties in the insurance application as to the health of the insured and his promise not to use intoxicating liquors to excess in the future, the claimants reply that the insurance company issued the policy with full knowledge of the untruthfulness of the answers in the application, such reply merely alleges knowledge at the time of issuing the policy and is demurrable, since it fails to aver that the insurer had notice of the violation of the agreement not to use intoxicating liquors to excess, and with such notice accepted payment of premiums. (*Northwestern etc. Assn. v. Bodurtha*, 414.)

32. INSURANCE—BREACH OF WARRANTY NOT TO DRINK TO EXCESS.—It is no defense to the breach of a promissory warranty in an insurance policy not to use intoxicating liquors to excess that the insurance company had knowledge at the time of issuing the policy that the insured had previously used intoxicants to excess to such an extent as to render him diseased from such dissipation. (*Northwestern etc. Assn. v. Bodurtha*, 414.)

33. INSURANCE—EXCESSIVE USE OF LIQUOR—WAIVER BY AGENT.—Where the agents of an insurance company, authorized to solicit applications and collect premiums, continue to collect premiums from an insured with knowledge of the fact that he was using intoxicating liquors to excess, in violation of his policy, such action amounts to a waiver of the right to declare a forfeiture, notwithstanding the agents failed to communicate their knowledge to the company. (*Northwestern etc. Assn. v. Bodurtha*, 414.)

34. INSURANCE—FORFEITURE OF POLICY—PLEADING.—An answer which seeks to avoid an insurance policy because of false statements made by the insured in his application in regard to his health need not allege that the insurance company was imposed upon or that it believed the false statements were true, where the representations are material, the policy states that it was issued in consideration of the representations and warranties made in the application, and the policy and application are made parts of the answer. (*Northwestern etc. Assn. v. Bodurtha*, 414.)

35. INSURANCE—MISREPRESENTATIONS.—If an insurance company is misled by a false warranty intentionally made by the applicant as to his occupation, the knowledge of the agent of the insurer taking the application of such misrepresentation does not emasculate the warranty of its vitiating quality. (*Triple Link etc. Assn. v. Williams*, 34.)

See Bonds.

INTEREST.

See Negotiable Instruments, §.

INTERPLEADER.

INTERPLEADER—WHO ENTITLED TO.—In case of a controversy between an original contractor and his partner and such contractor's assignee, respecting a balance due on the building contract, the owner of the premises is entitled to maintain a bill of interpleader against all of the parties, requiring them to interplead concerning their respective claims to such fund. (*Lapenta v. Lettieri*, 315.)

INTOXICATING LIQUORS.

1. INTOXICATING LIQUORS—RIGHT TO OWN, THOUGH SALE IS PROHIBITED.—The fact that the sale of alcoholic liquor is prohibited in a designated portion of the state does not destroy the right of a person to own such an article within the prohibited territory. (*Henderson v. Heyward*, 384.)

2. MUNICIPAL CORPORATIONS—PURCHASE OF INTOXICATING LIQUORS—PENAL ORDINANCE.—A city cannot, without express legislative authority so to do, pass any ordinance making penal the buying of alcoholic liquor from one lawfully authorized to sell it. (*Henderson v. Heyward*, 384.)

3. MUNICIPAL CORPORATIONS—PURCHASE OF INTOXICATING LIQUORS.—The "general welfare" clause of a city charter does not authorize the passage of an ordinance prohibiting the purchase of spirituous liquor, or interfering with the right to receive it after a purchase from one who was lawfully authorized to sell. (*Henderson v. Heyward*, 384.)

4. MUNICIPAL CORPORATIONS—RECEPTION OF INTOXICATING LIQUORS—INTERFERENCE WITH—VOID ORDINANCE.—A city ordinance, passed without express charter authority, and which makes it penal for one who has lawfully purchased alcoholic liquor without the city limits to receive it therein, without paying a specific tax of a given amount for the privilege of so doing, is void for want of municipal authority to pass it, although the sale of such liquor, within the city, is prohibited. The city has no power, under the "general welfare" clause of its charter, to pass such an ordinance. (*Henderson v. Heyward*, 384.)

5. SALES ARE CONSUMMATED AND EXECUTED UPON DELIVERY AND TRANSFER OF TITLE.—Hence, where liquor is sold to be delivered f. o. b. the cars at a certain place, it becomes the property of the purchaser when it is delivered at such place to the carrier, who, for the purposes of delivery, represents the purchaser. (*Bollinger v. Wilson*, 646.)

6. INTOXICATING LIQUORS—PLACE OF SALE—CONFLICT OF LAWS—ILLEGAL SALE—RECOVERY OF CONSIDERATION. In a Minnesota action to recover the possession of a note held by an attorney for collection, but which was given by the plaintiff, in Iowa, in payment for beer ordered in that state, and where the liquor was delivered in Wisconsin, and shipped from the latter state to Iowa, under a contract made with a view of evading the liquor laws of Iowa, and was there sold, without a permit, contrary to the laws of that state, the court is not justified in directing a verdict for the plaintiff, though, under the statutes of Iowa, any consideration paid or security given on account of an illegal sale of intoxicating liquor in that state might be recovered. The plaintiff is not, under the Iowa statute, entitled to recover the note, as the sale was made in Wisconsin and not in Iowa, and it is only in the case of an Iowa sale that the purchaser can recover the consideration paid under the statute of that state. (*Bollinger v. Wilson*, 646.)

See Former Acquittal, 1.

JOINT LIABILITY.

See Negligence, 8.

JUDGMENTS.

1. JUDGMENTS—PRIVITY.—A judgment is binding between the parties and all persons who are represented by them and claim under them, or who are privy to them. (*Ahlors v. Thomas*, 820.)

2. JUDGMENTS.—BY PRIVITY is meant mutual or successive relationship to the rights of property, and it is classified into privity in estate, privity in blood, and privity in law, in all of which there must be an identity of interest. (*Ahlors v. Thomas*, 820.)

3. JUDGMENTS—PRIVITY—INJUNCTION—GRANTEE OF PARTY.—A grantee of a person who has been enjoined from diverting the waters of a stream adjoining his land is in privity with him and bound by the injunction, although not a party to the suit in which it was granted. (*Ahlors v. Thomas*, 820.)

4. JUDGMENTS—SERVICE OF SUMMONS ON WRONG PERSON.—If summons in an action names "John Lynch" as defendant, and is personally served on "John M. Lynch," who is not the person upon whom the summons ought to have been served, a judgment taken against the latter by default, upon his failure to appear, is nevertheless valid until regularly vacated or set aside. (*Ueland v. Johnson*, 698.)

5. JUDGMENTS—SERVICE ON WRONG PERSON—MOTION TO VACATE.—If summons in an action names "John Lynch" as defendant, and is personally served on "John M. Lynch," a judgment by default against the latter is valid until vacated, and the trial court may entertain his motion to vacate it and permit him to answer upon condition that he pay costs. (*Ueland v. Johnson*, 698.)

6. JUDGMENTS—EVIDENCE OF ANTECEDENT DEBT.—A judgment is not, at least as against strangers to it, evidence of the

antecedent existence of the debt for which it was rendered. (*Hoerr v. Meihofers*, 674.)

7. JUDGMENTS — LIEN.—JUDGMENTS OF FEDERAL COURTS are liens upon the lands of the judgment debtor throughout the district in which the court has jurisdiction, when similar judgments of state courts are made liens by the law of the state in which such federal judgment is rendered. (*Blair v. Ostrander*, 532.)

8. JUDGMENTS OF FEDERAL COURTS—LIEN OF.—RE-ENACTMENT OF STATE STATUTES, ineffectual when passed by reason of their attempting to regulate the lien of judgments of federal courts without authority, is not necessary in order to make them operative, after Congress has authorized such legislation. (*Blair v. Ostrander*, 532.)

See Attachment, 7-9; Costs, 3; Executions, 1; Fraudulent Conveyances, 3, 5, 6; Municipal Corporations, 16.

JUDICIAL SALES.

See Executions; Executors and Administrators, 2.

JURISDICTION.

JURISDICTION — ACTION AGAINST DEAD DEFENDANT.—An action begun and prosecuted against a defendant who was dead when it was begun is absolutely void, and can be attacked collaterally as well as directly. (*Shea v. Shea*, 779.)

See Attachment, 2, 3; Certiorari; Contempt, 1; Executors and Administrators, 3, 4; Infants, 1.

LIBEL.

1. LIBEL—PRIVILEGED COMMUNICATION.—In an action for libel the defendant may, under a general denial, avail himself of the defense that the article complained of is a privileged communication. (*Anderson v. Cowles*, 310.)

2. LIBEL—CRIMINAL—PRIVILEGED COMMUNICATION.—The publication of charges against a candidate for office outside of the district for which he may be elected is not privileged, and, on a criminal prosecution for the publication of such libel, the accused's belief in its truth is no defense. (*State v. Haskins*, 560.)

3. LIBEL—CRIMINAL—PRIVILEGE—BELIEF IN TRUTH OF CHARGE AS DEFENSE.—In a criminal prosecution for the publication of libelous matter shielded by no privilege, the defendant cannot exonerate himself by showing a belief on his part in the truth of the charge. (*State v. Haskins*, 560.)

See Sheriffs, 2, 3.

LICENSE.

1. CONSTITUTIONAL LAW—ACT VOID FOR UNCERTAINTY.—An act which imposes a license tax upon merchants who conduct department stores, but which fails to define the life and duration of the license to be issued, is void for uncertainty. (*State ex rel. Wyatt v. Ashbrook*, 765.)

2. CONSTITUTIONAL LAW — DEPARTMENT STORES — CLASS LEGISLATION.—An act which imposes a license tax on all persons and corporations who conduct department stores for the

sale of more than one class or group of goods is class legislation, by making an arbitrary and unreasonable classification of merchants, and is unconstitutional, since it infringes on the right of the citizen to the enjoyment of the gains of his industry, and deprives him of liberty and property without due process of law. (*State ex rel. Wyatt v. Ashbrook*, 765.)

See *Mandamus*; *Police Power*, 2.

LIEN.

LIEN FOR ABATING A NUISANCE—ENFORCEMENT OF—CONSTITUTIONALITY.—A lien given by statute upon premises for the expense of abating an insect pest nuisance thereon is not for a delinquent tax, but for an indebtedness due the county, and its enforcement in the way prescribed by the statute is not obnoxious to any constitutional inhibition. (*County of Los Angeles v. Spencer*, 217.)

See *Mechanics' Liens*; *Vendor and Purchaser*, 1.

LIMITATION OF ACTIONS.

LIMITATIONS OF ACTIONS—FRAUDULENT CONTRACT—ENFORCEMENT OF.—If a party who has procured a fraudulent contract, or who seeks to take advantage of it, asks to have it declared valid, or to enforce its executory terms, thus asking affirmative relief, the statute of limitations does not bar the defendant, in such a case, from objecting to the validity or to the enforcement of the contract upon the ground of fraud. (*Hart v. Church*, 195.)

See *Subrogation*, 2, 3.

LIS PENDENS.

LIS PENDENS.—THE OBJECT of notice of a pending action is to keep the subject of the suit within the control of the court until judgment is rendered. The lis pendens may be defined to be the jurisdiction, power, or control which courts acquire over property involved in a suit pending the continuance of the action and until final judgment therein. (*Dupee v. Salt Lake Valley etc. Co.*, 902.)

MAINTENANCE.

See *Husband and Wife*.

MANDAMUS.

MANDAMUS—MERCHANT'S LICENSE.—Where all the requirements of law preliminary to acquiring a license to conduct a business have been complied with by a merchant, the issuance of such license, if refused, may be compelled by mandamus, since such duty is merely ministerial. (*State ex rel. Wyatt v. Ashbrook*, 765.)

See *Courts-martial*, 4.

MASTER AND SERVANT.

1. MASTER AND SERVANT—VICE-PRINCIPALS.—Whether an employé is a vice-principal depends upon his authority to represent the master. (*Grattis v. Kansas City etc. R. R. Co.*, 721.)

2. NEGLIGENCE—VICE-PRINCIPAL.—An employer's liability for the negligent act of his vice-principal or superintendent cannot

be measured by the latter's pulse of temperament, nor can the character of a given act of the superintendent in respect to negligence be made to depend upon his excitability, or the reverse. It is his duty to do what an ordinarily careful and prudent man would do under the same circumstances. Failing in this his employer is liable. (*Bessemer Land etc. Co. v. Campbell*, 17.)

3. MASTER AND SERVANT—FELLOW-SERVANTS.—The conductor, engineer, and fireman on the same railroad train are fellow-servants. (*Grattis v. Kansas City etc. R. R. Co.*, 721.)

4. MASTER AND SERVANT—FELLOW-SERVANTS—LIABILITY FOR INJURY TO.—The conductor, engineer, and fireman on the same train are fellow-servants, and in case of injury to a fireman caused by an open switch, and the failure of the engineer to observe the rules of the railroad company and stop his train after express notice from the fireman of the danger, the fireman cannot recover from the company for his injury, in the absence of proof of the incompetency of the engineer, although the fireman was helpless to stop the train. He assumed the risk when he entered the employment. (*Grattis v. Kansas City etc. R. R. Co.*, 721.)

5. MASTER AND SERVANT—FELLOW-SERVANTS—LIABILITY FOR INJURY TO.—The conductor, engineer, and fireman on a railroad train are fellow-servants, and, in case of injury to a fireman caused by an open switch, and the failure of the engineer to stop, the conductor's signal to the engineer to go ahead just before the accident does not have the effect of suspending or waiving the rules of the company requiring all trainmen to observe targets and danger signals at switches, and in case of doubt to stop, so as to make the company liable for the injury to the fireman. (*Grattis v. Kansas City etc. R. R. Co.*, 721.)

6. MASTER AND SERVANT—FELLOW-SERVANTS ARE ENGAGED IN A COMMON EMPLOYMENT when each of them is occupied in service of such a kind that all the others, in the exercise of ordinary sagacity, ought to be able to foresee, when accepting their employment, that his negligence would probably expose them to injury. (*Mann v. O'Sullivan*, 149.)

7. MASTER AND SERVANT—FELLOW-SERVANTS—ASSUMPTION OF RISKS.—Employés assume the risk incident to danger from the negligence of a coemployé, where such danger is fairly apparent. (*Mann v. O'Sullivan*, 149.)

8. MASTER AND SERVANT—FELLOW-SERVANTS—ELEVATOR OPERATOR.—A CARPENTER engaged in inclosing an elevator shaft within a glass frame for the owner of a building is a fellow-servant with one who is operating the elevator at the time for such owner, as they are employed "in the same general business." Hence, the owner is not answerable for an injury to the carpenter which results from the operator's negligence. (*Mann v. O'Sullivan*, 149.)

9. MASTER AND SERVANT—FELLOW-SERVANT—INJURY BY—PLEADING.—If a complaint for personal injury shows that the injury was caused by the negligence of the plaintiff's fellow-servant, that fact need not be pleaded in the answer, but may be taken advantage of by demurrer. (*Mann v. O'Sullivan*, 149.)

10. MASTER AND SERVANT—DANGEROUS WORK—MASTER'S DUTY.—If a carpenter, engaged in repairing an elevator, relies alone upon his confidence that the operator of the elevator will not start it without giving him notice, in accordance with the contractor's request, the master is not bound to give such notice, and is not answerable for an injury caused by the failure of the operator to give it. (*Mann v. O'Sullivan*, 149.)

11. MASTER AND SERVANT—CONCURRENT NEGLIGENCE OF A FELLOW-SERVANT AND ANOTHER.—Where an injury is the result of the concurring negligence of two employes, it is no defense to prove that the negligence of one of the employes, who is a fellow-servant, contributed to the injury, where the other employe is not a fellow-servant, and his negligence contributed directly to the injury. (Kansas City etc. R. R. Co. v. Becker, 78.)

12. MASTER AND SERVANT—FELLOW-SERVANTS, WHO ARE NOT.—AN ENGINE INSPECTOR employed at a roundhouse and a fireman working on the road are not fellow-servants within the meaning of a statute which requires that different employes, to be fellow-servants, must be working together to a common purpose in the same department of service. (Kansas City etc. R. R. Co. v. Becker, 78.)

13. MASTER AND SERVANT—ASSUMPTION OF EXISTENCE OF RELATION.—If, in an action to recover for personal injury, the fact that a certain person was the defendant's superintendent is proved by his own and other evidence, and in no way denied nor disputed, it is not ground for reversal of the judgment that the court in its instructions assumed the existence of such relation. (Bessemer Land etc. Co. v. Campbell, 17.)

14. MASTER AND SERVANT—AUTHORITY TO PROTECT PROPERTY.—When one places his property in the possession of another, the right to protect that possession, as well as the right to prevent any interference with its immediate use, springs out of the possession and out of the duty to control and manage it. (Galveston etc. Ry. Co. v. Zantzinger, 829.)

15. MASTER AND SERVANT—EJECTING TRESPASSER—EVIDENCE.—Where an engineer of a switch engine has complete and absolute control of the machinery of the engine, there is sufficient evidence to require the court to submit to the jury the question of the authority, express or implied, of the engineer to eject a trespasser from the footboard of the locomotive, though such trespasser did not interfere with the actual manipulation of the machinery. (Galveston etc. Ry. Co. v. Zantzinger, 829.)

16. MASTER AND SERVANT—SAFE MACHINERY.—The master cannot be deemed guilty of negligence if he furnishes his servant with machinery and appliances reasonably safe when used in the manner they are intended to be used, but which may become dangerous if their use is perverted by the servant. (Grattis v. Kansas City etc. R. R. Co., 721.)

See Burglary; Negligence, 2; Railroads, 10-14.

MECHANICS' LIENS.

1. MECHANICS' LIENS—NOTICE TO OWNER.—If an original contractor takes a partner in the contract before the commencement of the work, and such partnership is not recognized nor assented to by the owner of the building erected under such contract, a certificate of lien filed in the name of both partners, more than sixty days after the commencement of the work, is of no validity under a statute providing that no person other than the original contractor, or a subcontractor whose contract has been assented to by the owner of the building, shall be entitled to claim any lien, unless he shall, within sixty days from the time he commences work, give written notice to the owner of an intention to claim a lien. (Lapenta v. Lettieri, 315.)

2. MECHANICS' LIENS—OWNER'S ACT OR ASSENT IS ESSENTIAL.—Under the Utah statute, land upon which a building

is erected, or upon which materials are furnished, is not subject to a mechanic's lien unless the work is done, or materials furnished at the instance of the owner, or by some one acting by his authority or under him, as his agent, contractor, or otherwise. (*Morrison v. Clark*, 924.)

3. MECHANICS' LIENS—LAND OF MARRIED WOMAN.—If a husband, without the consent and against the protests of his wife, and not acting as her agent, contracts for, and proceeds to erect, a dwelling-house on land owned by her, a materialman cannot acquire a lien on such land for materials furnished, although she occupies the premises with her husband, and has knowledge that the work is being done. (*Morrison v. Clark*, 924.)

MILITIA.

See Courts-martial.

MINES AND MINING.

1. MINES—RIGHTS OF LOCATOR OF CLAIM.—When a locator perfects a valid location to a lode or placer mining claim, he is entitled to the exclusive possession and enjoyment of the lands located, for all purposes granted by the act of Congress. (*Mt. Rosa Min. etc. Co. v. Palmer*, 245.)

2. MINES—RIGHTS OF LOCATOR.—A PLACER LOCATION gives only a qualified possession of the ground located. It confers the exclusive right of possession of the surface area for all purposes incident to the use and operation of the same as a placer mining claim, and all unknown lodes or veins, but does not give the right of possession to known lodes or veins within its limits. (*Mt. Rosa Min. etc. Co. v. Palmer*, 245.)

3. MINES—TITLE OF LOCATOR—ACTION TO QUIET TITLE.—The locator of a lode mining claim has an estate and interest in real property which is treated as an estate in fee as against everyone except the United States, and he may bring a suit to quiet title under a statute which permits such an action to be brought by any person in possession of real property, against any person who claims an estate therein adverse to him. (*Mt. Rosa Min. etc. Co. v. Palmer*, 245.)

4. MINES—WIDTH OF LODGE CLAIM WITHIN PLACER CLAIM.—Under a statute entitling the locator of a placer mining claim, who patents a lode claim within the boundaries of his placer claim, to twenty-five feet on each side of such lode claim, and providing that if he makes no claim to such lode he has no right to its possession, the limitation of the width of a lode claim is applicable not only to the placer claimant, but applies as well to others who locate a lode within the boundaries of his previously located placer. (*Mt. Rosa Min. etc. Co. v. Palmer*, 245.)

5. MINES AND MINING—LOCATION WORK, WHO AUTHORIZED TO DO.—Work done by a mere trespasser or stranger to the title of a mine does not inure to the benefit of the locator, but if the mine is represented by an owner, and annual work is performed by or at his instance, or of some one in privity with him, it is sufficient. (*Nesbitt v. Delamar's etc. Min. Co.*, 807.)

6. MINES AND MINING—EFFECT OF CONGRESSIONAL ACTS.—The recording of the notice prescribed by special act of Congress suspending the requirement of section 2324 of the national Revised Statutes relative to the annual labor on mining claims, has the same legal effect as the performance of such labor. (*Nesbitt v. Delamar's etc. Min. Co.*, 807.)

7. MINES AND MINING—ASSESSMENT WORK—FORFEITURE.—If a person, under the honest belief that he has secured the interest of two of three original locators of a mining claim, by purchase, under execution sale, and, being recognized as tenant in common by the other original locator, and at his instance, files notice, as required by special act of Congress, that they intend in good faith to hold and work such claim, he thereby prevents the claim from becoming forfeited or subject to relocation, so long as such notice is in effect. (*Nesbitt v. Delamar's etc. Min. Co.*, 807.)

8. MINES AND MINING—ASSESSMENT WORK—NOTICE, WHO MAY FILE.—In order to entitle a mine locator to file the notice authorized by special act of Congress that he, in good faith, intends to hold and work the claim, it is not necessary that he should have a valid title to such claim, especially when there are conflicting locations of the same claim. (*Nesbitt v. Delamar's etc. Min. Co.*, 807.)

9. MINES AND MINING—JUDGMENT QUIETING TITLE—RIGHT TO ATTACK.—A judgment quieting title to a mining claim in favor of one of the original locators and his cotenants, as against defendant, whose relocation is invalid, cannot be attacked by the latter on the ground that the alleged title of such cotenants is in other parties. (*Nesbitt v. Delamar's etc. Min. Co.*, 807.)

10. MINES AND MINING—COTENANCY QUIETING TITLE.—If a complaint alleges that plaintiff and his cotenants are in possession of a mine, and prays that the title be quieted in him and them, the action is for the benefit of all of the cotenants. (*Nesbitt v. Delamar's etc. Min. Co.*, 807.)

11. MINES AND MINING.—NOTICE OF ADVERSE CLAIM to a mine may be filed by one cotenant in behalf of all of them, without power of attorney from his cotenants. (*Nesbitt v. Delamar's etc. Min. Co.*, 807.)

12. MINES AND MINING.—PUBLICATION AND POSTING OF NOTICE OF APPLICATION FOR PATENT to a mine is a process which brings all adverse claimants into court, and compels them to appear and file adverse claims. (*Nesbitt v. Delamar's etc. Min. Co.*, 807.)

13. MINES AND MINING—ADVERSE CLAIMS—WAIVER.—Failure to file an adverse claim to a mine within the time fixed by law, after application for a patent therefor, operates as a waiver of all rights which were the proper subject of such claim. (*Nesbitt v. Delamar's etc. Min. Co.*, 807.)

14. MINES AND MINING—LOCATIONS—COMPLIANCE WITH MINING LAWS.—To enable a person to maintain a right to a mining claim after it has been acquired, it is necessary that he shall continue substantially to comply, not only with the laws of Congress, but with the valid laws of the state and valid rules established by miners, in force in the district in which the claim is situated. A failure to comply with such laws and rules works a forfeiture of the claim, and it becomes subject to relocation by any qualified locator. (*Sisson v. Sommers*, 815.)

15. MINES AND MINING—LOCATION WORK—MINING LAWS.—A state statute requiring a mine locator, in order to perfect his location, to sink a discovery shaft, or make a cut of a certain depth, within ninety days after posting notice of the location, is not in conflict with the national mining law giving the locator one year in which to do one hundred dollars' worth of work, as a condition of holding the claim. (*Sisson v. Sommers*, 815.)

16. MINES AND MINING—LOCATION WORK—STATE LAWS.—The state cannot, by its legislation, dispense with the performance of the conditions imposed upon mine locators by national law, nor relieve the locator from the obligation of performing in good faith those acts which are declared by it to be essential to the maintenance and perpetuation of the estate acquired by location; but the state may require a reasonable additional amount of work to be done annually, and a reasonable amount of work to complete the location, or, after location, a reasonable additional amount of work within a reasonable time, less than the time named by the national law for the annual expenditure of one hundred dollars' worth of work, as a condition of the right acquired by location of the mine. (*Sisson v. Sommers*, 815.)

17. MINES AND MINING—STATE LAWS.—The national mining act implies that the states and territories may require a reasonable amount of work to be done by mine locators within a reasonable time after location, independently of the annual assessment work prescribed by Congress. (*Sisson v. Sommers*, 815.)

18. MINES AND MINING—LOCATION MARKS—NOTICE.—Whether a location of a mine is distinctly marked on the ground is a question of fact to be determined by proof aliunde. The location notice need not state how the claim is marked on the ground. (*Farmington etc. Co. v. Rhymney etc. Co.*, 913.)

19. MINES AND MINING—FINDING AS TO CLAIM—PRESUMPTION ON APPEAL.—A finding by the trial court that plaintiff has been in possession of a claim or mining location, and has in good faith developed and worked it, expending large sums of money thereon, and at all times complying with all mining laws and regulations, must be presumed to be correct on appeal. (*Farmington etc. Co. v. Rhymney etc. Co.*, 913.)

20. MINES AND MINING—LOCATION NOTICE—SUFFICIENCY.—If a mining location is made in good faith, the locator is not held to a strict compliance with the law in respect to his location notice; and if, by any reasonable construction, in view of the surrounding circumstances, the language employed in the notice as to description imparts notice to subsequent locators, it is sufficient. (*Farmington etc. Co. v. Rhymney etc. Co.*, 913.)

21. MINES AND MINING—LOCATIONS—CONSTRUCTION OF LAW.—The statute respecting the location of mining claims is construed liberally, and the sufficiency of the location and notice thereof, with reference to natural objects or permanent monuments, is simply a question of fact. (*Farmington etc. Co. v. Rhymney etc. Co.*, 913.)

MISTAKE.

EQUITY—JURISDICTION TO CORRECT MISTAKE.—In all cases of mistake in written instruments courts of equity can interfere only as between the original parties, or those claiming under them in privity. (*Adams v. Baker*, 799.)

MORTGAGES.

1. MORTGAGE IN EQUITY—HOW CREATED.—An agreement in writing to give a mortgage, or a mortgage defectively executed, or an imperfect attempt to create a mortgage or to appropriate specific property to the discharge of a particular debt, will create a mortgage in equity, or a specific equitable lien on the property intended to be mortgaged. (*Higgins v. Manson*, 192.)

2. MORTGAGE IN EQUITY—IMMATERIALITY OF FORM.—The form of an instrument which creates a specific equitable lien or mortgage on property is unimportant. The writing is sufficient when it clearly indicates an intention to make some particular property therein described a security for a debt. (*Higgins v. Manson*, 192.)

3. MORTGAGE IN EQUITY—WHAT CONSTITUTES—FORECLOSURE—MAXIM OF EQUITY.—A writing appended to a note and signed by the maker, and which states that he has deposited with the payee "as security" his government patent to certain described land, together with a further statement that he agrees "to transfer and assign over" to the payee all of his "right and title" to said land, should he fail to pay his obligation, creates an equitable mortgage, enforceable by foreclosure proceedings, for it is manifest that the land should stand as security for the debt, and the land is sufficiently described to indicate what was intended to be mortgaged. It is not material that the second part of the contract is executory, because equity regards as done that which ought to be done. (*Higgins v. Manson*, 192.)

4. MORTGAGE AND NOTE—VALIDITY—RATIFICATION—ESTOPPEL.—As a mortgage upon a homestead executed by a wife alone is void, neither the husband nor his wife can ratify it so as to give it validity, or be estopped by conduct from asserting its invalidity. But the rule is otherwise as to a wife's note secured by the mortgage. (*Hart v. Church*, 195.)

5. FRAUD IN OBTAINING SECURITY—CANCELLATION.—As a mortgage to secure a valid note may be procured by fraud, the mortgage may be canceled, leaving the note outstanding. (*Hart v. Church*, 195.)

6. FRAUD IN SALE OF NOTE AND MORTGAGE—PROOF OF PURCHASER'S KNOWLEDGE—NECESSITY OF.—After proof of the fraudulent intent of the vendor of a note and mortgage, and proof by a purchaser thereof that he took the note and mortgage before maturity and paid a valuable consideration therefor, a decree declaring the note to be fraudulent and voidable, and ordering its cancellation, cannot be sustained, where the plaintiff, in an action for the rescission and cancellation of the mortgage, on the ground that it was procured by menace and fraud, failed to prove that the purchaser had knowledge of the fraud and of the fraudulent intent of the vendor in making the sale to him. But the mortgage, if void, may be canceled, regardless of the alleged fraud. (*Hart v. Church*, 195.)

7. MORTGAGES.—THE TRANSFER OF ONE OF SEVERAL NOTES secured by mortgage clothes the transferee with the right to be first paid out of the mortgaged property, operates as an assignment pro tanto of the mortgage lien, and authorizes the transferee to foreclose such note under the power in the mortgage. (*Brewer v. Atkelson*, 64.)

8. MORTGAGES—PARTIAL ASSIGNMENT.—If a mortgagee transfers one of the mortgage notes, and the mortgagor subsequently pays the remaining mortgage notes and takes a quitclaim deed to the land mortgaged, such transferee of such note cannot maintain an action at law against the mortgagee for money received to his use. His mortgage lien, to the extent of his note, is not affected, and he may foreclose it against the land. (*Brewer v. Atkelson*, 64.)

9. MORTGAGES—PERSONALTY ATTACHED TO REALTY.—A prior mortgagee acquires no interest in chattels attached to

realty under a contract between mortgagor and tenant that the property so attached shall remain the property of the tenant attaching it, subject to the limitation that the mortgagor and tenant cannot by their acts do anything to impair the mortgagee's security. (*Broadbent v. Smith*, 61.)

10. MORTGAGES—RIGHT TO SEVERED FIXTURES.—A mortgagee not in possession cannot maintain an action of replevin against a bona fide purchaser of a fixture severed from the mortgaged premises and sold by the mortgagor while in possession. (*McKelvey v. Creevey*, 821.)

11. MORTGAGES—LIENS—AFTER-ACQUIRED PROPERTY. A mortgage of subsequently acquired property, especially by general terms of description, which is not the product, increase, or accretion of something already owned by the mortgagor, amounts to nothing more than a mere agreement to give a further mortgage, and confers no specific lien on such after-acquired property. (*Christian & Craft etc. Co. v. Michael*, 30.)

12. MORTGAGES—FRAUDULENT CONVEYANCES—RESERVATION OF BENEFIT TO MORTGAGOR.—If it is evident from the terms of a mortgage and the course of dealing between the mortgagor and mortgagee, that it is the understanding and intention between such parties that a benefit is to be reserved to the mortgagor, the mortgage is thereby rendered void under section 2150 of the Alabama code, as against existing or subsequent creditors of the mortgagor. (*Christian & Craft etc. Co. v. Michael*, 30.)

13. MORTGAGES—PARTIAL FORECLOSURE—CONTINUATION OF LIEN.—Mortgaged property may be sold under foreclosure to satisfy a part of the debt due, and if notice of the action is filed at the commencement of the suit, the lien of the entire debt may be preserved by the decree of partial foreclosure, as against subsequent encumbrances or redemptioners. (*Dupee v. Salt Lake Valley etc. Co.*, 902.)

14. MORTGAGES—PARTIAL FORECLOSURE—PRESERVATION OF LIEN.—If a decree of foreclosure for the portion then due of the mortgage debt recites the preservation of the lien for the portion of the debt not yet due, and an announcement of that fact is made at the sale, it is not necessary that such announcement be incorporated in the notice or certificate of sale nor in the deed. (*Dupee v. Salt Lake Valley etc. Co.*, 902.)

15. MORTGAGES—FORECLOSURE—PARTIES BOUND BY DECREE.—Parties, purchasers, and redemptioners, in foreclosure proceedings, are bound by the decree, and redemption can be made subject only to the conditions therein imposed. A redemptioner becomes the assignee of the purchaser, succeeds only to his rights, and cannot claim under one portion of the decree and repudiate another. (*Dupee v. Salt Lake Valley etc. Co.*, 902.)

16. MORTGAGES—PARTIAL FORECLOSURE—NOTICE TO REDEMPTIONER.—A redemptioner from a purchaser at a foreclosure sale for part of the mortgage debt under a decree continuing the lien of the mortgage in force is not entitled to notice, after the mortgagee has given notice to the attorney of record, of a motion made to the court for a sale of the property upon the maturity of the entire mortgage debt. (*Dupee v. Salt Lake Valley etc. Co.*, 902.)

17. MORTGAGES—PARTIAL FORECLOSURE.—If foreclosure of mortgage is had before the whole debt is due, and the decree directs a sale for the debt then due, subject to a lien for the part not due, and the mortgagee who holds the entire debt purchases and receives a deed for the premises, this is a satisfaction of the entire

ebt, but if redemption is made from the purchaser by the mortgagor or his judgment creditor, the debt not due at the time of the sale and the lien remain in force and the mortgagee may again foreclose as to it. (*Dupee v. Salt Lake Valley etc. Co.*, 902.)

18. MORTGAGES—PARTIAL* FORECLOSURE—EQUITY.—Mortgage sales are controlled by the court so that no injustice may be done to either party, and if only a part of the mortgage debt is due, and foreclosure on that part is sought, but the mortgaged premises cannot be sold in parcels without injury, that fact should be shown to the court and a decree rendered accordingly. (*Dupee v. Salt Lake Valley etc. Co.*, 902.)

19. MORTGAGES—REDEMPTION BY GRANTEE.—The holder of an equitable mortgage in form of an absolute deed may redeem from a mortgage foreclosure of the land, as a creditor, without any previous adjudication that his interest in the premises is that of a mortgagee. (*Schelbel v. Anderson*, 664.)

See Homestead, 12-16.

MUNICIPAL CORPORATIONS.

1. MUNICIPAL CORPORATIONS—PUBLIC CONTRACTS—PATENTED ARTICLES.—Although material to be used in the construction of a public work is in the control of a single dealer, by reason of a patent or otherwise, specification of that material may be made in a contract for such work to be let on competitive bidding. (*Holmes v. Common Council*, 587.)

2. MUNICIPAL CORPORATIONS—ESTOPPEL TO CLAIM LAND.—Counties, cities, and towns may so deal with land within their limits as to be estopped to assert title thereto, although the statute of limitations may not run against them. (*Davenport v. Boyd*, 536.)

3. MUNICIPAL CORPORATIONS—ESTOPPEL TO CLAIM LAND.—If a city taxes land and levies special assessments upon it for thirty years, and an individual occupies under a claim of right in good faith for nineteen years, without deceiving or misleading the officers of the city, and its rights could have been easily ascertained at all times, the city is estopped to assert title to the land as against such individual. (*Davenport v. Boyd*, 536.)

4. MUNICIPAL CORPORATIONS—ASSESSMENTS FOR LOCAL IMPROVEMENTS—TAXING DISTRICT—SPECIAL BENEFITS.—EACH PARCEL of contributing property in a taxing district for local improvements therein may be assessed only to the extent that it actually receives special benefits. (*Adams v. Shelbyville*, 484.)

5. MUNICIPAL CORPORATIONS—ASSESSMENTS FOR LOCAL IMPROVEMENTS—WHOLE TAXING DISTRICT—SPECIAL BENEFITS.—A taxing district for local improvements may, as a whole, be assessed only to the extent of the sum of the special benefits actually received by the several parcels of contributing property. (*Adams v. Shelbyville*, 484.)

6. MUNICIPAL CORPORATIONS—ASSESSMENTS FOR LOCAL IMPROVEMENTS—EXCESS OF COSTS OVER SPECIAL BENEFITS.—A local improvement in a taxing district, so far as its cost exceeds the special benefits resulting to the several parcels of property therein, is a benefit to the municipality at large, and such excess must be borne by the general treasury. (*Adams v. Shelbyville*, 484.)

7. MUNICIPAL CORPORATIONS—ASSESSMENTS FOR LOCAL IMPROVEMENTS—HEARING AS TO SPECIAL BENEFITS.

FITS.—Property owners, affected by a local improvement within a taxing district, are entitled to a hearing on the question of special benefits. (*Adams v. Shelbyville*, 484.)

8. MUNICIPAL CORPORATIONS—ASSESSMENTS FOR LOCAL IMPROVEMENTS—DUTY OF COMMON COUNCIL.—As special benefits are the only foundation for special assessments, the common council of a municipality not only have the power, but it is their imperative duty, under the laws of Indiana, in reviewing and altering assessments for street improvements, to adjust them to conform to the actual special benefits accruing to each of the abutting property owners. (*Adams v. Shelbyville*, 484.)

9. MUNICIPAL CORPORATIONS—ASSESSMENTS FOR LOCAL IMPROVEMENTS.—A DEFICIT IN SPECIAL BENEFITS.—To meet the cost of a street improvement, must, under the statutes of Indiana, be provided for from the general revenues of the municipality. (*Adams v. Shelbyville*, 484.)

10. MUNICIPAL CORPORATIONS—ASSESSMENTS FOR LOCAL IMPROVEMENTS—VALIDITY OF STATUTE.—The statute of Indiana concerning assessments for local improvements, commonly known as the "Barrett law," is not obnoxious to any provision of the state or federal constitution. (*Adams v. Shelbyville*, 484.)

11. MUNICIPAL CORPORATIONS—ASSESSMENTS FOR LOCAL IMPROVEMENTS—ORNAMENTAL WORK.—A city, without express authority, has no power to construct lawns or other decorations in the streets, and to enforce the cost thereof against abutting property owners. Hence, a resolution passed by a city council for a street improvement, which requires the space between the sidewalk and curb to be filled at the expense of abutters with "rich dirt and sodding," is ultra vires and void. (*Adams v. Shelbyville*, 484.)

12. MUNICIPAL CORPORATIONS—ASSESSMENTS FOR LOCAL IMPROVEMENTS—ACCRUING BENEFITS.—The imposition of assessments for local improvements per front foot, irrespective of the question of accruing benefits, is in violation of the fourteenth amendment to the federal constitution. (*Adams v. Shelbyville*, 484.)

13. MUNICIPAL CORPORATIONS—ASSESSMENTS FOR LOCAL IMPROVEMENTS—TAXING DISTRICT.—The legislature may create, or authorize a municipality to create, a local taxing district for local improvement purposes, which includes part only of the property within the municipality. (*Adams v. Shelbyville*, 484.)

14. MUNICIPAL CORPORATIONS—ASSESSMENTS FOR LOCAL IMPROVEMENTS WITHIN TAXING DISTRICT.—The legislature may declare, conclusively, that only the property within a taxing district, created for local improvement purposes, shall be specially assessed on account of local improvements within that district. (*Adams v. Shelbyville*, 484.)

15. MUNICIPAL CORPORATIONS—NEGLIGENCE—SETTING BACK SEWAGE.—A municipal corporation is liable for injury to property arising from the setting back of sewage during a severe but not extraordinary, storm, when such injury is due to the negligence of the city in failing to remove temporary obstructions from a sewer after the completion of its construction or alteration (*Judd v. Hartford*, 312.)

16. MUNICIPAL CORPORATIONS—JUDGMENT AGAINST—DEFENSE OF WANT OF FUNDS.—A municipal corporation can

not avoid a judgment for a common-law liability by pleading that it has no money on hand out of which it can be paid. (*Judd v. Hartford*, 312.)

17. MUNICIPAL CORPORATIONS—ERECTION OF PRISON BUILDING—DAMNUM ABSQUE INJURIA.—A city does not invade property rights by merely erecting and maintaining a necessary prison building within its limits. Hence, no action for damages can be maintained against the city therefor by the owner of adjacent property injured thereby, as the injury to one's business and the depreciation of property in such a case are *damnum absque injuria*. The owner, however, would have a remedy if, after the erection of the building, it is so maintained as to be a nuisance. (*Long v. Elberton*, 363.)

18. MUNICIPAL CORPORATIONS ARE PERSONS IN LAW, capable of inflicting injuries, and liable to suit by him who suffers them, unless they flow from and are incidental to, the performance of governmental duty. (*Judd v. Hartford*, 312.)

19. MUNICIPAL CORPORATIONS—FAILURE TO KEEP HIGHWAY IN REPAIR—LIABILITY OF OFFICERS.—Town trustees and a town marshal, acting *ex officio* as street commissioners, are jointly liable in damages for an injury caused to the plaintiff, on a dark night, by falling into a culvert, which such officers negligently permitted to remain open and in a dangerous condition without railing or protection, where it was the plain and certain duty of such officers to keep the highway in safe repair. (*Doeg v. Cook*, 171.)

20. MUNICIPAL CORPORATIONS.—MUNICIPAL DUTIES ARE GOVERNMENTAL when imposed by the state for the benefit of the general public, and municipal immunity does not reach beyond such governmental duties. (*Judd v. Hartford*, 312.)

21. GOVERNMENTAL USE may include any act which the state may lawfully perform or authorize, and in this sense a governmental act is one done in pursuance of some duty imposed by the state on a person, individual or corporate, which is one pertaining to the administration of government, and is imposed as an absolute obligation on a person who receives no profit or advantage peculiar to himself from its execution. (*Platt v. Waterbury*, 335.)

22. A MUNICIPAL CORPORATION IS LIABLE FOR THE ACTS OF ITS COMMISSIONERS within the scope of their authority. (*Platt v. Waterbury*, 335.)

23. MUNICIPAL CORPORATIONS—OFFICERS OF—LIABILITY.—When the duty of a municipal officer is plain, certain, and imperative, involving no exercise of discretion, he is answerable for its negligent performance, or nonperformance, at the suit of any person who is specially injured thereby. (*Doeg v. Cook*, 171.)

24. MUNICIPAL CORPORATIONS.—POWERS OF CITY OFFICERS are limited strictly to those contained in the statutory grant, and when the power contained in such grant is limited or otherwise becomes nugatory or inoperative, all municipal rights hereunder cease, and all ordinances passed thereunder become inoperative, so far as they are affected by the change or repeal in the grant of power under which the ordinance was passed. (*Nelden v. Clark*, 917.)

25. MUNICIPAL CORPORATIONS—POWER OF OFFICERS.—If officers of a municipal corporation do an act in excess of their corporate authority, the corporation is not bound, and when the statute under which the corporation acts, or should act, especially

restricts its action to a particular mode, or confers the power assumed upon others, none of the agents through whom the corporation acts can bind it in any manner other than that prescribed in the act granting the power. (*Nelden v. Clark*, 917.)

26. MUNICIPAL CORPORATIONS.—INJUNCTION MAY ISSUE AGAINST CITY OFFICERS to restrain them from refusing to permit a board of public work to act in accordance with law in making city improvements. (*Nelden v. Clark*, 917.)

See Injunctions, 1; **Intoxicating Liquors**, 3, 4; **Pleading**, 1; **Waters and Watercourses**, 11-18.

MUTUAL BENEFIT SOCIETIES.

See Insurance, 27-29.

NEGLIGENCE.

1. NEGLIGENCE.—IF DUE CARE AND DILIGENCE demand another course than the one taken by the superintendent of a mine in extinguishing a fire, his employer cannot avoid liability by evidence that the superintendent consulted the operatives in the mine, and acted on their advice. (*Bessemer Land etc. Co. v. Campbell*, 17.)

2. NEGLIGENCE.—DUTY TO ESCAPE.—AN EMPLOYE PLACED IN DANGER OF HIS LIFE by the negligence of his superior is not absolutely bound to escape, if there is time for him to do so, but only to do all that a man of ordinary care and diligence would have done under the circumstances to escape. (*Bessemer Land etc. Co. v. Campbell*, 17.)

3. NEGLIGENCE.—DAMAGES.—MEASURE OF.—In an action to recover for the negligent killing of an employé, his recovery cannot be limited to the amount he would have contributed to the support of his dependent next of kin if the evidence tends to show that he saved part of his wages after paying the living expenses of himself and those dependent upon him. (*Bessemer Land etc. Co. v. Campbell*, 17.)

4. NEGLIGENCE.—DAMAGES.—MEASURE OF.—In an action to recover for the negligent killing of an employé, shown to be a strong, healthy, sober, and industrious young man, a regular worker and experienced miner, the defendant is not prejudiced by evidence that an average miner, in "good health, and strength, and industry could dig from five to nine tons of coal a day at those mines at that time," when such evidence is introduced to determine the earning capacity of the plaintiff. (*Bessemer Land etc. Co. v. Campbell*, 17.)

5. NEGLIGENCE.—EVIDENCE.—In an action to recover for the negligent killing of an employé, evidence to show the feasibility of getting water in a certain way to extinguish a fire, and thus have saved plaintiff's life, is admissible. (*Bessemer Land etc. Co. v. Campbell*, 17.)

6. NEGLIGENCE.—SPECIFIC ACTS.—In an action to recover for injury resulting from negligence, averments of specific acts of negligence are not required. (*Bessemer Land etc. Co. v. Campbell*, 17.)

7. NEGLIGENCE.—CARE REQUIRED TO PRESERVE HUMAN LIFE.—When human life is at stake, the rule of due care and diligence requires everything that gives reasonable promise of its preservation to be done, regardless of difficulties or expense. The person upon whom the duty of action rests does not discharge

it by using only the means immediately at hand, unless such means are adequate. (*Bessemer Land etc. Co. v. Campbell*, 17.)

8. JOINT LIABILITY—CONCURRENT NEGLIGENCE.—IF DIRECT PERSONAL INJURY is occasioned by the separate but concurrent negligence of two or more parties at one and the same time, an action will lie against one and all of them. (*Doeg v. Cook*, 171.)

See Appeal, 10; Banks, 2-4; Electric Companies; Municipal Corporations, 15; Railroads; Telegraph Companies, 8, 6.

NEGOTIABLE INSTRUMENTS.

1. NEGOTIABLE INSTRUMENTS—RIGHT OF TRANSFEREE TO FILL BLANKS.—If the maker delivers a negotiable instrument containing blank spaces intended to be filled, the transferee has implied power to complete the instrument by filling the blanks in the way contemplated by the maker and the latter is thereafter liable to a bona fide holder without notice. (*Weidman v. Symes*, 603.)

2. NEGOTIABLE INSTRUMENTS—FILLING BLANKS—LIABILITY OF MAKER.—If the maker of a note fills in all the blanks upon a printed form except the one intended for the rate of interest, and that is thereafter filled by his transferee without his knowledge, he is liable to a bona fide holder without notice. (*Weidman v. Symes*, 603.)

3. ALTERATION OF INSTRUMENTS—INTEREST CLAUSE IN NOTE—RELEASE OF SURETY.—Where an agreement is made that notes shall be executed bearing eight per cent interest, and the principal and surety sign them in blank as to the rate of interest, a subsequent insertion of the agreed rate by the principal and payee, without the knowledge and consent of the surety, is a material alteration of the instrument which will release the surety. (*Moore v. Hinshaw*, 434.)

4. ALTERATION OF INSTRUMENTS—WHAT IS NOT.—An erasure, by the holder of a promissory note, of an indorsement of payment thereon, although fraudulently made, is not such an alteration of the note as will avoid it, because such an indorsement is no part of the contract evidenced by the original note. (*Theopold v. Delke*, 607.)

5. EVIDENCE—PAROL.—A MEMORANDUM OF A PARTIAL PAYMENT INDORSED by the holder on the back of a promissory note is a mere acknowledgment, in the nature of a receipt of payment, which is open to contradiction or explanation by parol. (*Theopold v. Delke*, 607.)

6. NEGOTIABLE INSTRUMENTS—TRANSFER OF, WITHOUT INDORSEMENT—FAILURE OF CONSIDERATION AS A DEFENSE—ESTOPPEL.—If a note and mortgage, given to a contractor, as the consideration for constructing certain buildings, are transferred without indorsement on the note, and suit is brought thereon, the maker may plead failure of consideration as a defense, where the payee failed to do the work, although the plaintiff, having knowledge of the consideration for the note, took it before any actual breach of the contract, and notwithstanding an agreement between the maker and the payee that the latter might use the note and mortgage as security for borrowed money. (*Hays v. Plummer*, 153.)

7. NEGOTIABLE INSTRUMENTS—DEFENSE OF FAILURE OF CONSIDERATION—EVIDENCE INADMISSIBLE.—If a note

and mortgage, given by an owner to a contractor as the consideration for constructing certain buildings, are transferred without indorsement on the note, and the assignee sues thereon, in which suit a failure of consideration is pleaded as a defense by the maker, evidence that the contractor gave a bond to the owner for the faithful performance of his contract is not admissible in evidence, for it is not connected with the other instruments, or the defense thereto, but is separate and distinct from them. (*Hays v. Plummer*, 153.)

8. **NEGOTIABLE INSTRUMENTS—INDORSEMENT—NECESSITY OF.**—A note payable to a certain person or order can take its place in the hands of a subsequent holder with the peculiar qualities and incidents of negotiable paper only where it has been regularly indorsed in such a way that the indorsement becomes a part of the paper. (*Hays v. Plummer*, 153.)

9. **NEGOTIABLE INSTRUMENTS—TRANSFER OF, WITHOUT INDORSEMENT—DEFENSE—GENERAL RULE.**—If negotiable paper, payable to order, is delivered to a purchaser without indorsement, he takes only the rights which the payee has, and the paper is subject to any defense which the payor may rightfully assert as against the payee. (*Hays v. Plummer*, 153.)

10. **NEGOTIABLE INSTRUMENTS—TRANSFER OF, BY SEPARATE WRITING—FAILURE OF CONSIDERATION AS A DEFENSE.**—An assignment of a mortgage and note, made on a separate writing, without indorsement on the note, does not confer upon the assignee the rights of an indorser in due course, and the maker, in an action upon the note and mortgage, may, therefore, plead failure of consideration as a defense. (*Hays v. Plummer*, 153.)

11. **NEGOTIABLE INSTRUMENTS—INDORSEMENT OF NON-NEGOTIABLE INSTRUMENT—EFFECT OF.**—A payee of a non-negotiable instrument does not, by merely writing his name on the back of it, become liable thereon as an indorser; but if such writing is accompanied by a promise, made upon a valuable consideration, to pay the face value of the paper, it may be enforced against him. (*Jossey v. Rushin*, 377.)

NEW TRIAL

1. **A NEW TRIAL CANNOT BE GRANTED** merely to obtain a slight reduction in damages, little more than nominal when the plaintiff is entitled to nominal damages at least. (*Watson v. New Milford*, 345.)

2. **NEW TRIAL—PROPER DESCRIPTION OF VERDICT—EVIDENCE.**—A verdict which is contrary to the evidence is correctly described, in a motion for a new trial, by the language of the statute, as "not sustained by sufficient evidence"; and when so stated, it is not necessary to allege that the verdict is contrary to the evidence. (*Stevens v. Leonard*, 446.)

3. **NEW TRIAL—MATTERS OF ORATORY—DISCRETION OF COURT.**—All matters of oratory are necessarily left to the sound discretion of the trial judge, and his ruling concerning them will not justify the granting of a new trial where no abuse of discretion appears. (*Conley v. Redwine*, 398.)

See Appeal.

NOTARY PUBLIC.

NOTARY PUBLIC — AFFIDAVIT — ADMINISTERING OATH TO COPARTNER.—A notary public is without authority to

administer an oath to an affidavit when the affiant is his copartner and the matter is one in which the firm is interested. (*Smalley v. Bodinus*, 602.)

NUISANCE.

1. **NUISANCE—EVIDENCE—DAMAGES.**—In an action to recover for a nuisance, evidence of what it would cost to clean up the premises by removing the offensive deposit is relevant on the question of damages. (*Watson v. New Milford*, 345.)

2. **NUISANCE—EVIDENCE.**—In an action against a town to recover for a nuisance caused by the discharge from its sewers, evidence of the vote of the town authorizing the building of the sewers in question, provided a certain sum was raised by voluntary subscription, is admissible, whether the action taken was within the lawful powers of the town or not, and the annual reports of the town selectmen, showing what expenditures had been made on such sewers, are also admissible, although the selectmen might themselves have been called, and the original town accounts produced. (*Watson v. New Milford*, 345.)

3. **NUISANCE.—A LEGISLATURE** has the power to declare that to be a nuisance which is such in fact. (*County of Los Angeles v. Spencer*, 217.)

4. **STATUTES DECLARING WHAT IS A NUISANCE—EXERCISE OF JUDICIAL POWER—CONSTITUTIONALITY.**—A statute designed to protect and promote the horticultural interests of the state, which declares that all places, orchards, etc., infected with the pests mentioned in the statute are public nuisances, and which act is a proper exercise of the police power, is not unconstitutional on the ground that it confers judicial powers upon the horticultural commissioners, where a commissioner, in determining whether any particular place is a nuisance, must necessarily exercise some discretion which, in a strict sense, is judicial in its nature. (*County of Los Angeles v. Spencer*, 217.)

See *Liens*.

OFFICERS.

1. **OFFICERS—BONDS—RELEASE OF SURETIES.**—If a sheriff receives money, in his official capacity, belonging to a certain person, and duly tenders payment thereof to the latter's agent, who has full authority to demand, receive, and receipt therefor, but who, without just or lawful cause, refuses to accept or receive it, the sureties on the sheriff's official bond are thereby released from liability for the money, although the principal of such agent subsequently demands payment of such money from the sheriff and is refused. (*Hull v. Chapel*, 666.)

2. **OFFICERS—SALARY.**—A public officer is not entitled to his salary by virtue of a contract, express or implied. His right to such compensation exists as a creature of law, and as an incident to the office. (*Bates v. St. Louis*, 701.)

3. **OFFICERS—SALARY DURING ABSENCE.**—The right of a public officer to his fees, emoluments, or salary is such only as is prescribed by statute, and while he holds the office, such right is in no way impaired by his occasional or protracted absence from his post, or neglect of duty, or failure to perform any substantial service. (*Bates v. St. Louis*, 701.)

4. **OFFICERS—SALARY DURING ABSENCE.**—The mayor of a city is entitled to his salary during his temporary absence from

his post of duty, although the city charter provides that during the absence of the mayor from the city another city officer shall act as mayor and shall "receive the same compensation as the mayor." (Bates v. St. Louis, 701.)

See Embezzlement; Municipal Corporations, 20-26.

PARENT AND CHILD.

PARENT AND CHILD.—THE FUNERAL EXPENSES of a minor child are not a charge against his estate where he leaves a father surviving him who is able to pay them. (Rowe v. Baper, 411.)

PARTIES.

PARTIES DEFENDANT—PROPER JOINDER OF. a town marshal and town trustees may be joined in an action for damages for an injury caused by their separate but concurrent negligence, and as an official and his sureties may be joined in the same action, it is proper to join the marshal, his sureties, and the trustees as parties defendant in the action for such injury. (Doeg v. Cook, 171.)

See Setoff, 2.

PARTITION.

PARTITION—TENANTS FOR LIFE. the interest of the tenant in dower or other life tenant extends to the whole of the land of which partition is sought, an action therefor cannot be maintained against the life tenant, nor can the judgment affect his estate, but if the life estate extends to a part only of the land to be partitioned, an actual partition or sale thereof may be had, although it affects the life estate. (Hanson v. Ingwaldson, 692.)

See Adverse Possession, 3.

PARTNERSHIP.

1. PARTNERSHIP FOR FIXED TERM—POWER OF PARTNER TO DISSOLVE. partnership is, in its essence, a contract of agency based upon the assent of each of the partners, which may be retracted at any time as to future dealings by a termination of the partnership at the will of either partner, although the term of such partnership may not have expired. (Lapenta v. Lettieri, 815.)

2. PARTNERSHIP—DISSOLUTION—DUTY OF EACH PARTNER. voluntary dissolution of a partnership leaves each of the partners charged with the duty of administering the partnership assets, so far as he may have them in his possession or under his control, in such manner as to protect the partnership creditors. (Lapenta v. Lettieri, 815.)

PATENTED ARTICLES.

See Municipal Corporations, 1.

PHOTOGRAPHS.

See Sheriffs, 2.

PHYSICIANS.

See Witnesses, 6, 7.

PLEADING.

1. **PLEADING A CITY ORDINANCE.—A PETITION** which merely sets out the conclusions of the pleader upon the legal effect of a city ordinance, but does not allege the provisions of the ordinance either in terms or in substance, is not sufficiently definite as against a special demurrer. (*Brush Electric etc. Co. v. Lefevre*, 898.)
2. **PLEADING — DEMURRER — WAIVER OF DEFECT.—A CROSS-COMPLAINT**, in which the cross-complainant's want of capacity to maintain his suit affirmatively appears, is defective, if such defect is waived by a demurrer which assigns only a want of facts. (*Aetna Life Ins. Co. v. Sellers*, 481.)
3. **PLEADINGS TO SHOW THAT ACTS WERE THOSE OF DEFENDANT'S SERVANT.—AVERMENTS IN A COMPLAINT** that a certain person was in the employment and service of the defendant, that he had superintendence intrusted to him, that he was diligent while in the exercise of such superintendence, and that he was the defendant's superintendent, clearly show that such superintendence was intrusted to him by the defendant. (*Bessemer and etc. Co. v. Campbell*, 17.)

See Creditors' Suit; Receivers.

POLICE POWER.

1. **POLICE POWER.—TO SUSTAIN AN ACT OF LEGISLATION** as a police measure, its object must to some degree tend toward the prevention of some offense or manifest evil, or have for its aim the preservation of the public health, morals, safety, or welfare. (*State ex rel. Wyatt v. Ashbrook*, 765.)
2. **POLICE POWER — LICENSE FEE — REGULATING TRADE.**—A statute under the title "of an act to regulate business and trade," which allows any person to engage in the business designated by the act by the mere payment of a license fee, but which provides no police inspection, supervision, or regulation, is not a police measure; the act simply imposes a license fee. (*State ex rel. Wyatt v. Ashbrook*, 765.)
3. **POLICE POWER—EIGHT-HOUR LAW.**—A statute which prohibits a man from working more than eight hours a day in a purely private, lawful business, in which no special privilege or license has been granted by the state, and the carrying on of which is attended by no injury to the general public, on the ground that working longer may, or probably will, injure his health, is not a valid exercise of the police power. (*In re Morgan*, 269.)
4. **CONSTITUTIONAL LAW—REGULATION OF SALE OF FARM PRODUCTS ON COMMISSION.**—A statute to license, regulate, and define the business of commission merchants, or persons selling agricultural products and farm produce on commission, to require them to give bond to the state for the benefit of their consignors, and to make reports to them, or, upon their failure so to do, authorizing a commission to make investigation, and prescribing a penalty for its violation, is a valid exercise of the police power, and not unconstitutional, either as abridging the privileges or immunities of citizens, nor as depriving them of their liberty or property without due process of law, nor as denying them the equal protection of the law, nor as depriving them of the right to be secure in their persons, houses, papers, and effects against unreasonable search and seizure, nor as compelling them to be witnesses against themselves in criminal cases, nor as an interference with interstate commerce, nor as an unlawful delegation of legislative power. (*State v. Wagener*, 681.)

5. CONSTITUTIONAL LAW—SALE OF FARM PRODUCTS ON COMMISSION.—The peculiar characteristics of farm produce, and the liability to peculiar abuses resulting from a sale thereof on commission, are such as make a practical necessity for distinctive legislation on the subject different from what would be necessary in case of other property sold on commission, and justifies the legislature, in its discretion, in putting those who sell it on commission in a class by themselves, and this may be done as a valid exercise of the police power. (*State v. Wagener*, 681.)

PRISON BUILDING.

See Municipal Corporations, 17.

PRIVATE WAY.

See Easements.

PRIVILEGED COMMUNICATIONS.

See Libel, 1-3; Witnesses, 3-7.

PRIVITY.

See Judgments, 1-3.

PROCESS.

1. PROCESS—FEDERAL—POWER OF STATE OVER.—A state has no independent power to limit or affect the proceedings in, or process from, federal courts. (*Blair v. Ostrander*, 532.)

2. SERVICE OF PROCESS ON INFANTS—SUFFICIENCY.—Where the statute requires that a summons shall be served "by reading the writ to the defendant, and delivering to him a copy of the petition," or "where there are several defendants, by delivering to the defendant who shall be first summoned a copy of the petition and writ, and to such as shall be subsequently summoned a copy of the writ," the reading of the petition and writ to several infants and delivering a copy of the petition to the one first named does not constitute a valid service of process on any of the infants, unless it be the first. (*Westmeyer v. Gallenkamp*, 747.)

3. SERVICE OF PROCESS—CHANGE IN LAW.—Ignorance in regard to a change in the law relating to the service of process can furnish no excuse for depriving an infant of his property without due process of law, and service on an infant not in accordance with the changed law is not merely irregular, but void. (*Westmeyer v. Gallenkamp*, 747.)

4. SERVICE OF PROCESS.—INFANTS can neither acknowledge nor waive the service of process by which alone they can be subjected to the jurisdiction of the court. (*Westmeyer v. Gallenkamp*, 747.)

See Infants, 1; Judgments, 4, 5.

PRODUCTION OF PAPERS.

See Evidence, 4-7.

PROXIMATE CAUSE.

See Electric Companies.

PUBLIC CONTRACTS.

See Municipal Corporations, 1.

RAILROADS.

1. RAILROADS—LIABILITY FOR DEATH OF TRESPASSER.

A railroad company is liable for the death of a trespasser on its track, run over by a train, if its engineer could have stopped it in time to avoid the killing, had its fireman promptly notified such engineer of the danger after discovering the trespasser upon the track. (*Purcell v. Chicago etc. Ry. Co.*, 557.)

2. RAILROADS—LIABILITY FOR DEATH OF TRESPASSER.

The fact that a trespasser on a railroad track might have jumped to the ground, a distance of over eight feet, or that he might have laid down on the ties, to avoid being run over by an approaching train, does not relieve the railroad company from liability for killing him, if its employes neglected to exercise reasonable care for his safety after discovering him upon the track. (*Purcell v. Chicago etc. Ry. Co.*, 557.)

3. RAILROADS—NEGLIGENCE—TRESPASSERS.—A person who goes into the caboose attached to a freight train to visit a passenger, without business there or expectation of becoming a passenger, is a trespasser, to whom the railroad company owes no duty until it has knowledge that he is there; and it is not liable for causing his death in the absence of willful wrong or gross negligence on its part or that of its employes. (*Earl v. Chicago etc. Ry. Co.*, 516.)

4. RAILROADS—GROSS NEGLIGENCE.—The usual or reckless conduct by the employes of a railroad company does not necessarily constitute gross negligence. (*Earl v. Chicago etc. Ry. Co.*, 516.)

5. NEGLIGENCE AS TO CHILDREN—CARS AS "DANGEROUS MACHINES"—"TURNTABLE" CASES.—Traller-cars, left standing by a street railway company on a track in the street when not in use, and secured by ordinary brakes, are not "dangerous machines," within the meaning of the "turntable" cases, the consequences of meddling with which are not supposed to be fully comprehended by infant minds, although the cars are attractive to children, and may be left in a condition which makes it possible for them to loosen the brakes and push the cars along the track, thus putting the children in danger. (*George v. Los Angeles Ry. Co.*, 184.)

6. NEGLIGENCE—INJURY TO CHILDREN—TRAILER-CARS—PROPER INSTRUCTION—"TURNTABLE" CASES.—In an action against a street railway company for injuries to a boy nine years of age, while playing around and with traller-cars left on a street by the company, it is proper to instruct the jury that, if they believe from the evidence that the element of danger connected with the trailers was not a hidden or concealed danger, but was open to the observation, and could be comprehended by a boy of the plaintiff's age, with average intelligence, then, in such case, if the defendant's cars were held by brakes of the ordinary kind, and the brakes were set in a manner to hold the cars where they were left, unless some one loosened them, the plaintiff cannot recover; and such an instruction takes the case out of the class to which the "turntable" and like cases belong. (*George v. Los Angeles Ry. Co.*, 184.)

7. NEGLIGENCE OF CHILDREN—PRESUMPTION—CONTRIBUTORY NEGLIGENCE.—There is no presumption of law that a boy nine years of age, injured while playing around and with trailer-cars left by a street railway company at the end of its line in a city, did not have capacity to understand that it was dangerous for him to go in front of a moving car, and it is, therefore, proper to leave to the jury the question of his contributory negligence in so doing free from any such presumption. (*George v. Los Angeles Ry. Co.*, 184.)

8. RAILROADS—NEGLIGENCE IN RUNNING TRAINS AT NIGHT.—It is negligence in a railroad company to run its trains in the night-time at such rate of speed that it is impossible, by the use of ordinary means and appliances, to stop the train within the distance in which stock upon the track can be seen by the aid of the headlight on the engine. If injury results from such negligence, the company is liable to the owner of the stock killed or injured. (*Alabama Midland Ry. Co. v. McGill*, 52.)

9. RAILROADS—NEGLIGENCE.—If anything in surrounding conditions and circumstances suggests an increase of care in the operation of a railroad train to avoid peril and damage, the duty to increase such care proportionately increases. (*Alabama Midland Ry. Co. v. McGill*, 52.)

10. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE.—If a railroad employé is ordered by the superintendent to stop a moving car in an unusual and dangerous way, and the employé makes an attempt to stop it and is injured thereby, he is not, as matter of law, guilty of contributory negligence, if he has been in the service only a month, has never seen an attempt made to stop a car under such circumstances, and the attempt did not, to his inexperience, involve obvious danger or risks which a prudent man would not incur. He had the right to rely, to some extent, on the greater knowledge and experience of his superintendent, and upon the assumption that the latter would not expose him to unnecessary peril. (*Southern Ry. Co. v. Shields*, 66.)

11. RAILROADS—EVIDENCE OF NEGLIGENCE.—There is sufficient evidence to establish the negligence of a railroad company through its vice-principal, where, while wrecked cars which are in charge of such vice-principal are being run at the rate of five or six miles an hour, an employé riding on one of them is killed by a collision of one of the cars with a semaphore pole, and there was ground for apprehension that the cars would careen so much as not to pass objects along the track. (*St. Louis etc. Ry. Co. v. Touhey*, 109.)

12. RAILROADS—MASTER AND SERVANT—VICE-PRINCIPAL, WHO IS A.—A YARD FOREMAN of a switch crew, who has no authority to employ or discharge men, but who can report them when they fail or neglect or refuse to do their work, is a vice-principal and not a fellow-servant, under a statute which defines a vice-principal as a person intrusted by a railroad company with the authority of superintendence, control, or command of other persons in the employ of the company, or with the authority to direct any employé. (*St. Louis etc. Ry. Co. v. Touhey*, 109.)

13. RAILROADS—INJURY TO EMPLOYÉ—IMPENDING DANGER.—In an action to recover for the death of an employé, an instruction is correct which states that if at the time the deceased jumped from the car, the appearance of danger to him was sufficient to justify a person of reasonable firmness and prudence in believing that his safety required him to jump from the car in or-

er to escape the impending danger, then the fact that his death resulted from injuries received in making such jump will not defeat the action, even if the deceased might have escaped uninjured had he made no effort to leave the car. (*St. Louis etc. Ry. Co. v. Touhey*, 100.)

14. RAILROADS—ASSUMPTION OF RISKS BY EMPLOYÉ. Although a railroad employé assumes all the risks ordinarily incident to such employment, he does not assume a risk created by the negligent act of the railroad company, but only such risks as he knows to exist or may know by the exercise of ordinary care. (*St. Louis etc. Ry. Co. v. Touhey*, 100.)

15. RAILROADS—LIABILITY TO EMPLOYÉ UNDER CONTRACT MADE IN ANOTHER STATE.—A railroad company whose line is partly in one state may, under the statutes of that state, be liable in tort to an employé injured in such state, although the contract of service was entered into in another state. (*Kansas City etc. R. R. Co. v. Becker*, 78.)

16. JURY TRIAL—CURING BAD INSTRUCTION BY GOOD. In an action against a railroad company for injuries occasioned by a defective step on an engine, an instruction which assumes that such step was defective prior to the accident is cured by subsequent specific instructions that the plaintiff must prove the defect, that the company had notice of, or could by reasonable diligence have discovered, such defect prior to the accident, and that the presumption is that the railroad company had no notice of the defect, and that it had furnished safe and suitable appliances for the performance of its work. (*Kansas City etc. R. R. Co. v. Becker*, 78.)

See Master and Servant, 15; Taxes, 1-3.

RAPE.

DEFINITIONS.—THE TERM "FEMALE CHILD," as used in the Minnesota statute providing for the punishment of carnal knowledge of children, must be limited to children who have not reached the age of puberty. (*State v. Frey*, 660.)

RECEIVERS.

RECEIVERS—SUITS AGAINST—COMPLAINT.—A receiver can neither sue nor be sued without leave of the court by which he was appointed; hence in an action against a receiver it is essential to aver in the complaint that leave to bring the action has been obtained. (*Peirce v. Chism*, 441.)

REFORMATION.

See Homestead, 13.

RES GESTAE.

See Evidence, 9.

RIPARIAN PROPRIETORS.

See Waters and Watercourses.

ROGUES' GALLERY.

See Sheriffs, 3.

SALES.

See Factors.

SEARCH WARRANTS.

1. **SEARCH WARRANTS—RETURN OF.—TO JUSTIFY ACTS** done under a search warrant, it must be returned to court; otherwise the acts become trespasses ab initio. (*Anderson v. Cowles*, 310.)

2. **EVIDENCE RAISING COLLATERAL ISSUES.**—In an action to recover for maliciously procuring a search warrant, evidence by the defendant that he had been informed by a third person that the latter was in the company of plaintiff when he stole defendant's property, is not admissible to show reasonable cause for procuring such warrant. Such evidence would raise collateral issues not in the case. (*Anderson v. Cowles*, 310.)

SEQUESTRATION.

1. **SEQUESTRATION—WRIT OF—SEIZING PROPERTY OF STRANGER.**—A SHERIFF who, by virtue of a writ of sequestration, seizes specified property named in the writ, the property at the time being owned by, and in the possession of, a stranger to the writ, is not protected by the process in a suit against him by the owner to recover damages for such seizure. (*Vickery v. Crawford*, 891.)

2. **SEQUESTRATION—WRIT OF—PURPOSE.**—The writ of sequestration is sued out as an auxiliary writ merely to preserve the property pending the suit, and is intended only to enforce the right to its seizure which the plaintiff has acquired as against the defendant by complying with the statute. (*Vickery v. Crawford*, 891.)

3. **CONVERSION—RIGHTS OF OWNER—SEIZURE BY WRIT OF SEQUESTRATION.**—Although the owner of personal property, taken under a writ of sequestration against another, is given a statutory remedy by which he may regain possession and establish his ownership, and may also intervene in the sequestration suit and have his rights adjudicated, these rights do not deprive him of any remedy given by law to the owners of property for the conversion of their goods. (*Vickery v. Crawford*, 891.)

SETOFF.

1. **SETOFF—CROSS-COMPLAINT—WHEN PROPER.**—If commission merchants agree, in writing, to sell a crop of grapes and raisins for a vineyardist, and to make advances thereon, but such advances are in excess of the proceeds of sale, and their assignee brings suit to recover the balance, the defendant may properly file a cross-complaint against the assignors, averring that the money sued for was paid in part performance of their contract with him, and that they are liable to him for any breach of contract upon their part. (*Mackenzie v. Hodgkin*, 209.)

2. **SETOFF—CROSS-COMPLAINT—NEW PARTIES.**—If a complete determination of a controversy cannot be had without bringing in parties to the contract or transaction involved, and who have not been named as parties in the original action, such persons may be brought in as parties defendant to a cross-complaint. (*Mackenzie v. Hodgkin*, 209.)

3. **SETOFF—CROSS-COMPLAINT—SERVICE OF—HARMLESS IRREGULARITY.**—AN OMISSION to serve a cross-com-

plaint upon the plaintiff is not a fatal irregularity, where the plaintiff has been, by the answer, apprised of every issue, and has not been otherwise prejudiced by such omission. (*Mackenzie v. Hodgkin*, 209.)

SHELLEY'S CASE.

See Deeds, 1, 2.

SHERIFFS.

1. SHERIFFS—PHOTOGRAPHS OF PRISONERS—RIGHT TO TAKE.—A sheriff may lawfully take the photograph of a prisoner, and ascertain his height, weight, name, residence, place of birth, occupation, and the color of his eyes, hair, and beard, without being liable therefor on his official bond, where no force or violence is used, and the officer deems it necessary to secure the prisoner's safekeeping, or to retake him more readily should he escape. (*State v. Clausmeier*, 511.)

2. SHERIFFS—LIBEL.—THERE IS NO LIABILITY ON THE OFFICIAL BOND of a sheriff for language used by him concerning a person in his custody on a charge of crime, though it is slanderous or libelous per se, for, in using it, he is not acting as an officer. (*State v. Clausmeier*, 511.)

3. SHERIFFS — PUBLICATION IN ROGUES' GALLERY — LIBEL—NONLIABILITY.—A sheriff is not liable on his official bond for sending out to police departments and individuals photographs of a prisoner in his custody, with writings on the backs thereof, giving his description and the charge against him, for such an act is not one done in an official capacity. (*State v. Clausmeier*, 511.)

See Arrest, 2; Executions, 11, 12.

SITUS OF DEBT.

See Attachment, 6.

STATE.

ACTIONS AGAINST STATE—WHAT ARE NOT.—An action by a foreign insurance company against the state treasurer in his official capacity to recover taxes collected by him under a statute requiring all such insurance companies to pay to the state a certain amount from the premiums received on business done in the state, as a condition of their right to do business therein, is not a suit against the state. (*Scottish etc. Ins. Co. v. Herriott*, 548.)

STATUTE OF FRAUDS.

See Auctions; Contracts; Husband and Wife, 6; Insurance, 10, 11; Vendor and Purchaser, 7-9.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTES.

1. STATUTES—CHANGE IN LANGUAGE.—An amendment to a statute showing a change in language in a material respect indicates an intent to change the meaning of the law. (*San Antonio etc. Ry. Co. v. Southwestern Tel. etc. Co.*, 884.)

2. STATUTES—IMPLIED REPEAL.—If an earlier statute is impliedly repealed by a later one on account of repugnancy or inconsistency between the two, the repeal is measured by the extent of the conflict between them; and if any part of the earlier act can stand as not superseded or affected by the later, that part is not repealed. (*Nelden v. Clark*, 917.)

3. STATUTES—GENERAL AND SPECIAL CONSTRUCTION.—If there are two acts or provisions, one of which is special and particular, and certainly includes the matter in question, and the other general, which, if standing alone, would include the same matter, and thus conflict with the special act, the latter must be taken as intended to constitute an exception to the general act, especially when such general and special acts are contemporaneous. (*Nelden v. Clark*, 917.)

4. STATUTES—IMPLIED REPEAL.—The repeal of a statute depends upon the intent of the legislature, express or implied, and if the legislature makes a change in a particular statute and enacts a new one upon the same subject, and it is apparent from the latter that it was the intention of the legislature to change the present provision in the old law and enact a new one to effectuate its purpose, it is a plain declaration that whatever is embraced in the new act shall prevail, and that whatever is changed or excluded is discarded from it. It is also clear evidence of the intent of the legislature to enact the provisions of the later act as the only ones on that subject which shall be obligatory. (*Nelden v. Clark*, 917.)

5. CONSTITUTIONAL LAW—TITLE OF ACT—WATER RIGHTS.—A statute, whose title reads "An act to provide for the extension of the right of way for ditches, canals, and feeders of reservoirs in certain cases, and requiring registration of all such hereafter made or enlarged," expresses one general subject, the extension of the right of way for ditches, and a section thereof which relates to the filing and recording of maps and statements of all ditches and enlargements thereof thereafter to be made, and their priorities when made, is not covered by the title, within the meaning of a constitutional provision that no bill shall be passed containing more than one subject, which shall be clearly expressed in its title, and such section is void. (*Lamar Canal Co. v. Amity Land etc. Co.*, 261.)

6. STATUTES—EMBRACING MORE THAN ONE SUBJECT—CONSTITUTIONALITY.—"An act to promote and protect the horticultural interests of the state" is not unconstitutional on the ground that it embraces more than one subject, grouped under one title, where every provision of the act points directly to the protection and promotion of such interests. (*County of Los Angeles v. Spencer*, 217.)

7. STATUTES—IMPLIED REPEAL of statutes is not favored by law, but if an earlier and later statute are repugnant to each other, or are so irreconcilably in conflict that they cannot be harmonized to effectuate the purpose of their enactment, the later act, by implication, repeals the other. (*University of Utah v. Richards*, 928.)

8. STATUTES—CONFLICT—CONSTRUCTION.—One statute is not allowed to repeal another by implication if, by reasonable construction, the two can stand together. (*University of Utah v. Richards*, 928.)

9. STATUTES—CONSTRUCTION—CONFLICT.—Particular provisions in a statute relating to a former subject must govern in relation to that subject, as against general provisions in another

part of the law which otherwise might be broad enough to cover it. (University of Utah v. Richards, 928.)

10. **STATUTES—CONSTRUCTION.**—If a statute enumerates the persons and things to be affected by its provisions, there is an implied exclusion of others, and the inference follows that it is not intended to be general. (University of Utah v. Richards, 928.)

11. **STATUTES—CONFLICT—CONSTRUCTION.**—If one statute is specific, temporary, and special, and covers a definite, special subject, and another statute is general, and has no relation to the same subject or purpose, and is continuous in its operation, the two statutes are not repugnant to each other, may be easily harmonized, and one does not repeal the other by implication. (University of Utah v. Richards, 928.)

12. **STATUTES—CONSTRUCTION.**—One statute is not repugnant to another unless they both relate to the same subject and are enacted for the same purpose. If there is a difference in the whole purview of the two statutes, apparently relating to the same subject, one does not repeal the other. (University of Utah v. Richards, 928.)

13. **STATUTES — CONFLICT — CONSTRUCTION.** — If there are two statutes, or two provisions of the same act, one of which is special and particular and certainly includes the matter in question, and the other general, which, if standing alone, would include the same matter, and thus conflict with the special provision, the special act must be taken as intended to constitute an exception to the general act or provision, especially when both acts are contemporaneous, or passed at the same legislative session. (University of Utah v. Richards, 928.)

14. **STATUTES — CONFLICT — IMPLIED REPEAL.** — If, by fair and reasonable interpretation, acts which are seemingly contradictory may be enforced and made operative and harmonious, without obscurity or conflict, both must be upheld, and the later is not regarded as repealing the former by construction or intendment. Hence a later act covering part or all of the provisions of an earlier act does not necessarily repeal the latter. (University of Utah v. Richards, 928.)

15. **STATUTES—CONSTRUCTION.**—A clause in a statute providing that "all laws in conflict herewith shall not be construed to prevent the carrying out of the provisions of this act" is a declaration on the part of the legislature that such statute is enacted for a special, particular, and temporary purpose, and that it shall be enforced according to its terms without regard to any other law in force. (University of Utah v. Richards, 928.)

16. **CONSTITUTIONAL LAW—EIGHT-HOUR LAW.**—A statute which imposes a restriction upon workmen in underground mines and smelters as to the number of hours they shall work is unconstitutional and void, because it is an unwarrantable interference with the right of contract in a purely private business, and because it arbitrarily singles out a class of persons, and imposes upon them restrictions from which others similarly situated are exempt. (In re Morgan, 289.)

SUBROGATION.

1. **SUBROGATION.**—A DEVISEE of real property is substituted to all of the rights of the deviser in connection therewith, including the right of subrogation to a vendor's lien, upon the payment of a debt to which the devised property was subject. (Darrow v. Summerhill, 883.)

2. SUBROGATION—LIMITATION OF ACTIONS.—The right of subrogation to securities held by another arises upon an implied contract which is not evidenced by writing, and is subject to the bar of two years' limitation. (*Darrow v. Summerhill*, 833.)

3. SUBROGATION — LIMITATION OF ACTIONS.—EQUITY will not suspend the statute of limitations in favor of one who seeks to enforce his right of subrogation to a vendor's lien; an action to enforce such right must be brought within the statutory period. (*Darrow v. Summerhill*, 833.)

See Suretyship.

SUBSCRIBING WITNESSES.

See Wills, 6; Witnesses, 12.

SUMMONS.

See Process.

SURETYSHIP.

1. SURETYSHIP—SUBROGATION—DEBT ASSUMING DIFFERENT FORM.—A surety upon a bond given to enjoin the enforcement of a judgment based on a vendor's lien note, is entitled to subrogation to the vendor's lien upon the land if he is compelled to pay the judgment, since the lien follows the debt, and the money secured by the injunction bond was part of the debt contracted in the purchase of the land, although it had assumed a different form. (*Darrow v. Summerhill*, 833.)

2. SURETYSHIP—SUBROGATION — RIGHT OF SURETY'S GRANTEE.—If a surety, who has the right of subrogation to a vendor's lien upon land, conveys his land to another upon condition that such grantee will pay his debts, the grantee stands in the same position as his grantor with reference to the debt secured, and has the same right of subrogation to the vendor's lien as his grantor had. (*Darrow v. Summerhill*, 833.)

3. SURETYSHIP—RELEASE OF SURETY.—If the principal after the debt is due, duly tenders payment, and the creditor refuses to receive it, the surety is discharged. (*Hull v. Chapel*, 666.)

See Bonds; Officers.

TAXES.

1. TAXATION OF RAILROAD PROPERTY TO PAY RAILROAD BONDS.—If, under the law in force at the time that a railroad is built, and when a county issues its bonds to be exchanged for stock subscribed by the county in such railroad company, the property of the company in the county is liable for taxation to pay the principal and interest on such bonds, it remains thus liable although such bonds are refunded and reissued for the same debt after the railroad property has changed hands and passed to a new owner, and although the law may have been changed since the issue of the old, and before the issue of the new, bonds. (*State v. Keokuk etc. R. R. Co.*, 704.)

2. TAXATION—"ALL PROPERTY."—If words of general description are used in reference to taxation, such as the words "all property," they include all kinds of property not expressly or by necessary implication excepted. (*State v. Keokuk etc. R. R. Co.*, 704.)

3. TAXATION OF RAILROAD PROPERTY TO PAY RAILROAD BONDS.—If a statute provides that a county subscribing for stock in a railroad company shall become entitled to all privileges granted and subject to all liabilities imposed by the statute or the company's charter, and that it is authorized to levy a tax on all property legally taxable for county purposes to raise funds to pay such subscription, and that taxpayers who shall have paid assessments for such subscription shall be entitled to a transfer of the county's stock equal to their assessment, the property of the railroad company lying in the county, and whose road is constructed while such statute is in force, is subject to taxation to pay county bonds issued to pay the county's subscription for such railroad stock. (*State v. Keokuk etc. R. R. Co.*, 704.)

4. TAXATION—PAYMENT OF TAXES UNDER PROTEST—ACTION TO RECOVER.—If a state officer, acting under authority of a statute, receives taxes paid to him under duress and protest, an action may be maintained against him to recover the amount thus paid, provided the statute is void, although he has placed the money to the credit of the state. (*Scottish etc. Ins. Co. v. Herriott*, 548.)

5. CORPORATIONS, FOREIGN—TAX ON BUSINESS.—A statute requiring all foreign insurance companies to pay to the state a certain percentage of premiums received on business done in the state, as a condition of their doing business therein, is a tax on business, and not on property, and therefore not in violation of a constitutional provision that the property of corporations shall be subject to taxation in like manner as that of individuals. (*Scottish etc. Ins. Co. v. Herriott*, 548.)

6. CORPORATIONS, FOREIGN—TAX ON BUSINESS.—There is no constitutional provision, either federal or state, that taxes imposed on the business of foreign corporations, as a condition of their doing business within the state, shall be uniform. It is permissible for the state to exact a license fee, and also impose a tax on the business done. (*Scottish etc. Ins. Co. v. Herriott*, 548.)

7. CONSTITUTIONAL LAW—TAXATION.—"AN ACT TO REGULATE BUSINESS AND TRADE in cities," which imposes a direct tax upon department stores as a license, and which provides that two-thirds of the tax shall be paid into the city treasury, is violative of a constitutional provision which declares that the legislature shall not impose taxes on cities or other municipal corporations, or upon the inhabitants or property thereof, for city or other municipal purposes, but may, "by general laws, vest in the corporate authorities the power to assess and collect taxes for such purposes," since it undertakes to impose a direct tax upon a business occupation for city purposes. (*State ex rel. Wyatt v. Ashbrook*, 765.)

8. CONSTITUTIONAL LAW—TAXATION—POWER OF LEGISLATURE.—Under a constitutional provision which declares that the legislature shall not impose taxes upon cities or upon the inhabitants or property thereof for city purposes, the legislature cannot itself, or through the agency of commissioners, any more impose a tax directly upon an occupation or business in cities for city purposes, than it can directly impose taxes upon city property for city purposes. (*State ex rel. Wyatt v. Ashbrook*, 765.)

9. CONSTITUTIONAL LAW—GIVING AWAY TAXES.—If a tax imposed by a statute is a state tax, the legislature has no authority to give or remit any part of it to a city. (*State ex rel. Wyatt v. Ashbrook*, 765.)

10. CONSTITUTIONAL LAW—DELEGATING TAXING POWER TO COMMISSIONER.—An undetermined tax is in law no tax;

hence an act which empowers a commissioner to fix a license tax anywhere between a minimum and maximum amount, such fee to be uniform in each city, is unconstitutional, as being a delegation to such commissioner of the power to fix the amount of the tax. (*State ex rel. Wyatt v. Ashbrook*, 765.)

11. CONSTITUTIONAL LAW—UNIFORM TAXATION—DEPARTMENT STORES.—Under a constitutional provision that taxes "shall be uniform upon the same class of subjects," an act which imposes upon merchants conducting department stores in cities of fifty thousand inhabitants or more a tax, the amount of which, between certain limits, is fixed by a different commissioner for each city, is unconstitutional, since all merchants of that class are not necessarily subject to the same uniform rate of taxation. (*State ex rel. Wyatt v. Ashbrook*, 765.)

See Licenses; Municipal Corporations, 4-14.

TELEGRAPH COMPANIES.

1. TELEGRAPH COMPANIES—RULES—PRESENTATION OF CLAIM.—A rule of a telegraph company, requiring all messages received by it to be sent on one of its blanks containing a condition that the company will not be liable for damages or penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission, is a reasonable one, binding on the sender of the message, and does not limit the company's liability for negligence. (*Harris v. Western Union Tel. Co.*, 70.)

2. TELEGRAPH COMPANIES—NOTICE OF RULES.—A plea to a complaint against a telegraph company, averring that a message received for transmission was written on one of the company's blanks, upon which the requirement for notice of damages within sixty days was printed, and was sent subject to the contract expressed thereon, of which this requirement was a part, is the equivalent of an averment of notice of the rule on plaintiff's part. (*Harris v. Western Union Tel. Co.*, 70.)

3. TELEGRAPH COMPANIES—RULES—WANT OF NOTICE TO SENDER—NEGLIGENCE.—If an agent of a telegraph company receives a message for transmission, written on a plain piece of paper, and, without calling the attention of the sender to the regulations printed on the blanks of the company, pastes the message on one of such blanks, he acts as the agent of the company alone, and the sender is not bound by the regulations printed on the blanks, of which he had no notice, and he may recover for the negligence of the company in the transmission of the message. (*Harris v. Western Union Tel. Co.*, 70.)

4. TELEGRAPH COMPANIES—LIABILITY FOR DELAY.—A telegraph company, upon the receipt of a message and the sum demanded therefor, undertakes, notwithstanding any stipulations in its blanks, to transmit the message with reasonable care and dispatch, and to deliver it to the person addressed without neglect or unnecessary delay. For a failure to so deliver it the company is liable in damages. (*Barnes v. Western Union Tel. Co.*, 791.)

5. TELEGRAPH COMPANIES—LIABILITY FOR UNREPEATED MESSAGE.—A contract contained in a telegraphic blank stipulating that the company shall not be liable for mistakes or delays in the transmission or delivery, or for nondelivery of an un-repeated message, does not exonerate the company from liability for negligent delay in the delivery of an un-repeated message re-

ceived and correctly transcribed at the terminal or delivery office. (*Barnes v. Western Union Tel. Co.*, 791.)

6. NEGLIGENCE—PROXIMATE CAUSE.—Unreasonable delay in the delivery of a telegraphic message is not the proximate cause of an injury caused by being run over by rail-cars, due to the injured party's negligence. (*Barnes v. Western Union Tel. Co.*, 791.)

7. TELEGRAPH AND TELEPHONE COMPANIES—EMINENT DOMAIN.—A statute which confers upon telegraph companies the right of eminent domain in condemnation proceedings applies to telephone companies, and authorizes a like procedure by telephone companies. (*San Antonio etc. Ry. Co. v. Southwestern Tel. etc. Co.*, 884.)

8. TELEGRAPH AND TELEPHONE COMPANIES—TELEGRAPH INCLUDES TELEPHONE.—The phrases "magnetic telegraph lines" and "any telegraph lines," found in a statute, are broad enough to include the "telephone," which is merely another method of communication by means of electricity. (*San Antonio etc. Ry. Co. v. Southwestern Tel. etc. Co.*, 884.)

9. TELEGRAPH AND TELEPHONE COMPANIES—TELEGRAPH INCLUDES TELEPHONE—CHANGE IN STATUTE.—Although at the time a statute was passed relating to the "telegraph" the "telephone" was not in the contemplation of the legislature, because of its not being generally known, a subsequent act authorizing the creation of a corporation "for the construction and maintenance of a telegraph and telephone line" is a recognition of their substantial identity as a method of communication by means of electricity. (*San Antonio etc. Ry. Co. v. Southwestern Tel. etc. Co.*, 884.)

10. DAMAGES—MENTAL ANXIETY—FAILURE TO DELIVER TELEGRAM.—A person is not entitled to recover damages on account of the failure of a telegraph company to transmit and deliver a message, whereby his existing mental anxiety for his family is prolonged. (*Western Union Tel. Co. v. Giffin*, 896.)

TELEPHONE.

See Telegraph Companies, 7-9.

TORTS.

See Costs, 4.

TREATY RIGHTS.

See Corporations, 14.

TRESPASSERS.

See Master and Servant, 15; Railroads, 1-3.

TRIAL.

TRIAL—SUBMISSION OF ISSUES.—Under a statute authorizing the court to instruct the jury "to find upon particular questions of fact to be stated in writing," if the jury render a general verdict, the court is not required to thus submit all the issues. It is a matter resting in its discretion. (*George v. Los Angeles Ry. Co.*, 184.)

See Instructions.

hence an act which empowers a commissioner to fix a license tax anywhere between a minimum and maximum amount, such fee to be uniform in each city, is unconstitutional, as being a delegation to such commissioner of the power to fix the amount of the tax. (*State ex rel. Wyatt v. Ashbrook*, 765.)

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7. TELEGRAPH AND TELEPHONE COMPANIES—EMINENT DOMAIN.—A statute which confers upon telegraph companies the right of eminent domain in condemnation proceedings applies to telephone companies, and authorizes a like procedure by telephone companies. (*San Antonio etc. Ry. Co. v. Southwestern Tel. etc. Co.*, 884.)

8. TELEGRAPH AND TELEPHONE COMPANIES—TELEGRAPH INCLUDES TELEPHONE.—The phrases "magnetic telegraph lines" and "any telegraph lines," found in a statute, are broad enough to include the "telephone," which is merely another method of communication by means of electricity. (*San Antonio etc. Ry. Co. v. Southwestern Tel. etc. Co.*, 884.)

9. TELEGRAPH AND TELEPHONE COMPANIES—TELEGRAPH INCLUDES TELEPHONE—CHANGE IN STATUTE.—Although at the time a statute was passed relating to the "telegraph" the "telephone" was not in the contemplation of the legislature, because of its not being generally known, a subsequent act authorizing the creation of a corporation "for the construction and maintenance of a telegraph and telephone line" is a recognition of their substantial identity as a method of communication by means of electricity. (*San Antonio etc. Ry. Co. v. Southwestern Tel. etc. Co.*, 884.)

10. DAMAGES — MENTAL ANXIETY — FAILURE TO DELIVER TELEGRAM.—A person is not entitled to recover damages on account of the failure of a telegraph company to transmit and deliver a message, whereby his existing mental anxiety for his family is prolonged. (*Western Union Tel. Co. v. Giffin*, 896.)

TELEPHONE.

See *Telegraph Companies*, 7-9.

TORTS.

See *Costs*, 4.

TREATY RIGHTS.

See *Corporations*, 14.

TRESPASSERS.

See *Master and Servant*, 15; *Railroads*, 1-2.

TRIAL.

TRIAL—SUBMISSION OF ISSUES.—Under a statute authorizing the court to instruct the jury "to find upon particular questions of fact to be stated in writing," if the jury render a general verdict, the court is not required to thus submit all the issues. It is a matter resting in its discretion. (*George v. Los Angeles Ry. Co.*, 184.)

See *Instructions*.

TRUSTEE'S SALE.

See Auction.

VENDOR AND PURCHASER.

1. VENDOR AND PURCHASER—FORECLOSURE OF VENDOR'S LIEN—RIGHTS OF PURCHASER.—Where a vendor of real property, who retains the superior title to the land, sells the land upon foreclosure of his vendor's lien, the purchaser becomes the owner of the legal title and the debt for the purchase money, by subrogation, with the same rights as the vendor as against purchasers of the vendee, who had not been made parties to the foreclosure suit. (Thompson v. Robinson, 843.)

2. VENDOR AND PURCHASER—FORECLOSURE OF VENDOR'S LIEN—RIGHTS OF PRIOR PURCHASER FROM VENDEE. The foreclosure of a vendor's lien does not affect the rights of prior purchasers from the vendee, who are not parties to the suit, and they may perfect their title by paying to the purchaser at the foreclosure sale the purchase money paid by her. (Thompson v. Robinson, 843.)

3. VENDOR AND PURCHASER—DEFAULT IN PAYMENT—RIGHT OF PURCHASER AT FORECLOSURE.—The owner of the superior title to land and the debt for the purchase money, acquired at a sale upon foreclosure of the vendor's lien, may disaffirm the original contract of sale, as against purchasers from the vendee who are in default of payment for fifteen years, though not parties to the foreclosure suit, and convey to another, if the circumstances do not make it inequitable to do so. (Thompson v. Robinson, 843.)

4. VENDOR AND PURCHASER—DISAFFIRMANCE OF CONTRACT WITHOUT NOTICE.—A vendor who has waived a failure by his vendee to perform his contract is generally required to give notice to the vendee, demanding performance within a given time, before he can disaffirm his contract and resume possession and ownership of the land; but where the vendee and his heirs have failed to pay the interest or any part of the principal for thirty-two years, and for twenty-four years his widow and heirs have resided outside the state, so that there was no opportunity to give notice to them, no notice to perform is required before the vendor can abandon his contract. (Thompson v. Robinson, 843.)

5. VENDOR AND PURCHASER—DEFAULT OF VENDEE—WAIVER.—The foreclosure of a vendor's lien constitutes a waiver of the vendor's right to rescind the contract of sale for a prior failure to perform the contract, but it does not relieve the vendee, or purchasers from him who were not parties to the foreclosure suit, from the obligation thereafter to perform the contract within a reasonable time; hence a failure to offer to perform for more than fifteen years gives the vendor the right to abandon the contract without notice to the purchasers and to convey the land as his own. (Thompson v. Robinson, 843.)

6. VENDOR AND PURCHASER—INNOCENT PURCHASER—PLEADING.—A cross-complaint which seeks to avoid a conveyance on the ground that the purchaser had notice of the equitable title of the cross-complainant is insufficient as against a general demurrer, where it fails to allege that the purchase was from the fraudulent grantor or from a subsequent grantee charged with notice, because if the purchaser took title from a grantee who was an innocent purchaser, such title would be unaffected by any notice which the last purchaser might have. (Moore v. Allen, 255.)

7. STATUTE OF FRAUDS—ESTOPPEL TO ASSERT.—Although under a contract for the sale of land, it is the duty of one of the parties to remove the uncertainty of description of the subject matter by designating the specific lands to which it is to apply, he is not thereby estopped to deny the validity of the contract under the statute of frauds. (*Alabama Mineral Land Co. v. Jackson*, 46.)

8. STATUTE OF FRAUDS.—AN AGREEMENT TO MAKE A CONTRACT for the sale of lands must itself comply with the statute of frauds in all essential respects, including a description of the land. Otherwise, the agreement is void, and cannot support either a bill for specific performance, or an action for damages. (*Alabama Mineral Land Co. v. Jackson*, 46.)

9. STATUTE OF FRAUDS—CONTRACT TO PURCHASE TIMBER.—A written agreement by which one undertakes to sell and another to purchase the timber on a certain number of acres of land, to be selected by the purchaser, amounts to an agreement to make a contract for the sale of the land, and is, until such selection is made in writing, void under the statute of frauds. (*Alabama Mineral Land Co. v. Jackson*, 46.)

VENDOR'S LIEN.

See Vendor and Purchaser, 1.

VICE-PRINCIPAL.

See Master and Servant, 1, 2.

WATERS AND WATERCOURSES.

1. WATERS — PRIOR APPROPRIATION.—LOWER RIPARIAN PROPRIETORS cannot acquire the right to all the water of a creek, by prior appropriation, as against an upper riparian owner whose rights attached long before they made their appropriation. (*Bathgate v. Irvine*, 158.)

2. WATERS — PRESCRIPTION.—LOWER RIPARIAN PROPRIETORS cannot acquire the right to all the water of a creek by taking it out at a point on their own land and using it only as the upper riparian proprietor permits it to pass down through his land to the lower owners, for such use by the latter is not adverse in the sense required to give a right by prescription. (*Bathgate v. Irvine*, 158.)

3. WATERS—RIGHT TO DIVERT BEYOND WATERSHED. Land situated beyond the natural watershed of a stream is not riparian, although it is part of a contiguous tract, some of which is riparian, and riparian rights cannot extend beyond the watershed of the stream. Hence, the owner of such land cannot, under the sole claim of riparian right, take the water beyond such watershed, for any purpose, to the injury of another riparian owner. (*Bathgate v. Irvine*, 158.)

4. WATERS — DIVERSION — RETURN OF.—Water diverted from a stream by an upper riparian owner must be returned at the upper boundary line or above the land of a lower riparian owner. (*Bathgate v. Irvine*, 158.)

5. WATERS—KNOWLEDGE OF DIVERSION—ACQUIESCENCE—ADVERSE USE—ESTOPPEL.—An upper riparian proprietor's knowledge that lower riparian proprietors are using water taken out of a stream below him, and claim the right to use it,

is not evidence of acquiescence on the part of the upper owner; nor does it, as against him, establish adverse use, or constitute matter of estoppel. (*Bathgate v. Irvine*, 158.)

6. **WATERS — APPORTIONMENT — EXCLUSION OF EVIDENCE—WHEN NOT PREJUDICIAL.**—In an action between riparian owners to quiet title, the exclusion of evidence that the plaintiffs, the lower owners, had acquired by prescription all the riparian rights of all the riparian owners below them is not prejudicial error, where these owners were not parties to the suit, and the evidence was insufficient, as a whole, to enable the court to apportion the water. (*Bathgate v. Irvine*, 158.)

7. **WATERS—SUIT BETWEEN RIPARIAN OWNERS—APPORTIONMENT.**—In an action between riparian owners, the court, where it is unable, under the evidence, to apportion the water, may render judgment upon the rights of the parties, as riparian owners, with leave therein to any party to the suit to bring another action at any time to determine each party's proportionate part. (*Bathgate v. Irvine*, 158.)

8. **WATERS — RIPARIAN PROPRIETORS — ACTION BETWEEN—IMMATERIAL EVIDENCE.**—In a contest between riparian proprietors over the water of a stream, evidence which can add nothing to the plaintiff's right, as against the defendant, to divert the water is properly excluded as immaterial. (*Bathgate v. Irvine*, 158.)

9. **WATERS — NONUSER—STRENGTHENING TITLE BY.**—The nonuser of water by an upper riparian owner of land cannot be invoked to strengthen the claim of appropriation or prescription by a lower riparian owner, where the rights of the former attached first, and where the latter has used the water only as the former permitted it to pass to the lower owner. (*Bathgate v. Irvine*, 158.)

10. **WATERS—WHEN FACTS ASSUMED MAY BE TREATED AS ISSUES.**—If, in an action brought by lower riparian proprietors against an upper owner to determine water rights, there is some question as to whether or not the defendant had parted with his title, but it is assumed that he was owner of the land when the action was brought, and the plaintiffs and defendant submit evidence on that assumption, the trial court is justified in treating the ownership of the land and the water rights of the respective parties as issues in the case. (*Bathgate v. Irvine*, 158.)

11. **MUNICIPAL CORPORATION—POLLUTION OF STREAM—NUISANCE—LIABILITY FOR.**—If a municipal corporation creates a nuisance on the land of a lower riparian proprietor by discharging its sewage, consisting of surface water and house sewage, into a stream, it is liable therefor, although others contributed to it. (*Watson v. New Milford*, 345.)

12. **MUNICIPAL CORPORATIONS—POLLUTION OF STREAM—DAMAGES.**—A municipal corporation is liable to a lower riparian proprietor for a nuisance created upon his land by the discharge of the city sewage into a stream, and the fact that such proprietor suffers no personal inconvenience from the nuisance because he does not reside in the community is immaterial except on the question of damages. He is entitled to nominal damages at least, although he never visits his lands, and its rental or selling value remains unimpaired. (*Watson v. New Milford*, 345.)

13. **WATERS AND WATERCOURSES — POLLUTION — LICENSE.**—Although a riparian owner may have previously fouled the stream to the injury of those below him, this does not consti-

tute a license to those above him to pollute the stream in a similar manner. (*Watson v. New Milford*, 345.)

14. MUNICIPAL CORPORATIONS—POLLUTION OF STREAM—DAMAGES.—If a city creates a nuisance upon the land of a lower proprietor by the discharge of its sewage into the stream, the fact that the water remains potable by cattle and inhabitable by fish is immaterial except in mitigation of damages. (*Watson v. New Milford*, 345.)

15. WATERS AND WATERCOURSES—POLLUTION BY MUNICIPAL CORPORATION.—The mere granting of authority to a city to construct, for the convenience and benefit of its inhabitants, sewers adapted to carry off refuse matter to some neighboring stream, does not necessarily make such use of the sewers a governmental use so as to exempt the city from liability to lower riparian proprietors injured by such sewage. (*Platt v. Waterbury*, 335.)

16. WATERS AND WATERCOURSES—POLLUTION BY MUNICIPAL CORPORATIONS.—The right of a city to pour into a river surface drainage does not include the right to mix with that drainage filthy and noxious substances in such quantities that the river cannot dilute them nor safely carry them off without injury to the property of others. The latter act is, in effect, an appropriation of the bed of the river as an open sewer to carry such substances to the property of the lower proprietor, and is an invasion of his property rights. When done for a public purpose this may become justifiable, but only upon payment of compensation for the property thus taken. (*Platt v. Waterbury*, 335.)

17. WATERS AND WATERCOURSES—POLLUTION BY CITY—RIPARIAN RIGHTS.—If a city maintains a nuisance by discharging its accumulated filth and sewage in a stream to the injury of a lower proprietor, the fact that he also owns property in such city does not show such contribution to the injury of his lower land, as to deprive him of equitable relief. (*Platt v. Waterbury*, 335.)

18. WATERS AND WATERCOURSES—POLLUTION.—MUNICIPAL CORPORATIONS CANNOT ACQUIRE BY PRESCRIPTION any right to maintain a nuisance, consisting in the pollution of a stream, to the necessary injury of the health and property of another. (*Platt v. Waterbury*, 335.)

19. WATERS AND WATERCOURSES—RIPARIAN RIGHTS.—Whether or not the use of a river by a riparian proprietor is a reasonable use in view of the rights of other riparian proprietors depends largely on the circumstances of each case, and is essentially a question of fact. (*Platt v. Waterbury*, 335.)

20. WATERS AND WATERCOURSES—POLLUTION—NUISANCE.—The use of a stream for drainage may, under some circumstances, be reasonable, although the water is thereby rendered unfit for its primary use, but the concentration of the filth accumulated by one proprietor, whether an individual or a municipal corporation, and its discharge into the stream in such quantities that it is necessarily carried to the premises of another, where it produces a nuisance dangerous to his health and destructive of the value of his property, is unreasonable and creates liability. (*Platt v. Waterbury*, 335.)

See Statutes, 5.

WILLS.

1. WILLS—CONSTRUCTION—CHILDREN.—A gift made by will, to take effect upon the termination of a life estate, of a speci-

ded sum to each of the children of a certain daughter of the testator, includes not only her children in being at the death of the testator, but also those born or in ventre sa mere prior to the death of the life tenant. (*McLain v. Howald*, 597.)

2. WILLS—TESTAMENTARY CAPACITY—SUFFERING FROM ACUTE PAIN.—The circumstance that a testator, at the time of executing his will, is suffering from acute pain, does not take away his testamentary capacity. (*Stevens v. Leonard*, 446.)

3. WILLS—UNDUE INFLUENCE—EVIDENCE.—Upon the contest of a will, where the plaintiff claims that an unfriendly feeling by the testator for the latter's brother was merely the result of an insane delusion, the actual state of their relations may be shown. Hence, evidence is admissible, on the part of defendants, to prove that the brother had publicly declared to a crowd on one occasion that the testator had, in his lifetime, improved every opportunity to take advantage of his brothers, and had robbed them; and such evidence may be admitted without a preliminary showing that the testator had knowledge of the accusations before his will was made. (*Stevens v. Leonard*, 446.)

4. WILLS—UNDUE INFLUENCE—WITHDRAWING QUESTION OF FROM JURY.—On the trial of an action to contest a will on the ground that the testator was of unsound mind, and also for undue influence in the execution of the will, it is not error for the court, by a proper instruction, to withdraw from the jury the question of undue influence where there is no evidence that the will was procured by undue influence. (*Stevens v. Leonard*, 446.)

5. WILLS—UNDUE INFLUENCE.—THE IGNORING OF NEEDY RELATIVES by a testator is of itself entitled to little weight in determining whether his will was made under undue influence. (*Stevens v. Leonard*, 446.)

6. WILLS—CONTRADICTION BY SUBSCRIBING WITNESS—PROPER INSTRUCTION.—It is a familiar rule of law that a person who attaches his name as a witness to a testamentary instrument impliedly certifies that the testator is of sound mind and competent to make a will; and while the law will subsequently permit him to testify to the contrary, because the truth, if such it is, should be learned, yet the jury trying the case may consider the fact of such implied contradiction. It is proper, therefore, to so instruct the jury, for such a direction does not usurp their province in determining a question of fact, or in passing upon the credibility of a witness. (*Stevens v. Leonard*, 446.)

7. WILLS—EXPERT TESTIMONY—SANITY OF TESTATOR—STATEMENT OF FACT—EXPRESSION OF OPINION.—If a physician, shown to possess the necessary qualifications of an expert, is, upon the trial of an action to contest a will on the ground that the testator was of unsound mind, asked the question whether or not from his conversation with and examination of the testator at the time the will was made, such testator "was laboring under an insane delusion or anything of that kind," his answer, "No, he was not," is not objectionable as the statement of a fact, and not the expression of an opinion. (*Stevens v. Leonard*, 446.)

8. WILLS—ALTERATION OF, BY TESTATOR—PRESUMPTION.—When a portion of a will is canceled or erased by the testator himself, the presumption is that it was done with a view, and for the purpose, of substituting some other disposition of his property in place of that which is canceled or erased; and this presumption is just as strong when the words canceled or erased are

wholly illegible as where they can still be read by an expert with the aid of a glass. (Thomas v. Thomas, 639.)

9. WILLS—ALTERATION OF, BY TESTATOR—FAILURE OF NEW DISPOSITION—EFFECT OF.—If a portion of a will is canceled or erased by the testator himself with a view to a new disposition of the property, which proposed disposition falls for want of authentication, the presumption in favor of a revocation by the cancellation is repelled, and the instrument will stand as originally framed, so far as it is practicable to ascertain what the former words were. (Thomas v. Thomas, 639.)

10. WILLS—ALTERATION OF—LEGIBILITY AND ILLEGIBILITY—DISTINCTION.—There seems to be nothing in the statutes relating to the execution or the revocation of wills which requires any distinction to be made between a cancellation or erasure which renders the words wholly illegible, and a cancellation or erasure which leaves the words still capable of being ascertained from an inspection of the document. (Thomas v. Thomas, 639.)

11. EVIDENCE—PROOF OF ALTERATION IN WILL BY PAROL.—Parol evidence is admissible to prove what canceled or erased words in a will were. (Thomas v. Thomas, 639.)

12. WILLS—ALTERATION OF, BY STRANGER, AND ITS EFFECT.—If erasures and alterations in a will were made by some third party, without the procurement of the proponent, they do not avoid the will, either in whole or in part, but it may be proved and established as executed. (Thomas v. Thomas, 639.)

13. WILLS—ALTERATION OF, BY PROPONENT, AND ITS EFFECT.—If erasures and alterations in a will were fraudulently made by its proponent, or by his procurement, the provisions of the will in his favor are thereby avoided. (Thomas v. Thomas, 639.)

14. WILLS—ALTERATION OF, WHILE IN TESTATOR'S POSSESSION—PRESUMPTION.—If a will has remained in the possession of the testator from the date of its execution until his death, and is then found among his papers with erasures or alterations, the presumption is that they were made by himself. (Thomas v. Thomas, 639.)

15. WILLS—ALTERATION OF BENEFICIARY'S NAME AFTER PUBLICATION—ADMISSION TO PROBATE.—If a will is presented for probate, but it conclusively appears that, after its publication, the name of a beneficiary, the testator's son and proponent of the will, was erased and the name of such son's wife inserted in place thereof, and it also appears that, if the change was made by the testator himself, it was never published or authenticated so as to make it operative, the court may admit the will to probate with the name of the wife omitted and the name of the son restored, where it is, under the evidence, justified in finding that the erasure and alteration were made either by the testator himself or by a stranger, and not by the proponent. (Thomas v. Thomas, 639.)

16. ADOPTION—REVOCATION OF WILL.—Under statutes providing that all rights, duties, and relations between the parent and child by adoption, including the right of inheritance, shall be the same as exist by law between parent and child by lawful birth, and that the subsequent birth of a legitimate child to the testator before his death shall operate as a revocation of his will, the will of a testator is revoked by his subsequent adoption of a child. (Hilprie v. Claude, 524.)

WITNESSES.

1. **WITNESSES.—THE TESTIMONY OF A DECEASED witness** may be repeated at a subsequent trial. (*Western Assur. Co. v. McAlpin*, 423.)

2. **COSTS — EXPERT WITNESSES — FEES OF.**—Witnesses called by a party as experts are entitled to fees for daily attendance and for mileage as witnesses, but they are not entitled to fees as experts, or to be paid the expense of making surveys or preparing maps for such party, where they did not act under the direction of the court. (*Bathgate v. Irvine*, 158.)

3. **WITNESSES — PHYSICIANS — PRIVILEGED COMMUNICATIONS.**—In a suit by a husband against a physician for malpractice in the treatment of his wife, the physician may testify concerning any information which he may have acquired while attending her in a professional capacity, which information was necessary to enable him to properly treat her, notwithstanding a statute prohibits such disclosures without the consent of the patient, since no other person besides himself and the wife knows anything about the facts, and the proof of such facts is necessary to sustain his defense. (*Cramer v. Hurt*, 752.)

4. **WITNESSES—HUSBAND AND WIFE.**—In a suit by a husband against a physician for malpractice in treating his wife, the necessities of the case render the wife a competent witness in favor of her husband, where the facts in the case are known only to the physician and to the wife, and without her testimony the remedy afforded the husband by law will fail, notwithstanding that at common law a married woman is incompetent to testify in behalf of her husband. (*Cramer v. Hurt*, 752.)

5. **WITNESSES—HUSBAND AND WIFE—PUBLIC POLICY.**—On general grounds of public policy, a married woman is a competent witness for her husband, in a suit for damages by him against a physician who produces an abortion upon her without the consent of her husband. (*Cramer v. Hurt*, 752.)

6. **WITNESSES—PHYSICIAN AND PATIENT—WAIVER OF PRIVILEGE.**—A married woman who, in a suit by her husband alone against a physician for malpractice on her, is called by her husband as a witness, does not waive the protection of a statute which prohibits her physician from disclosing any information obtained by him in the course of his employment without her consent. (*Cramer v. Hurt*, 752.)

7. **WITNESSES—PHYSICIAN AND PATIENT—WAIVER.**—The bringing of a suit by a husband against a physician for malpractice on his wife does not constitute a waiver of her statutory protection and privilege of closing the physician's mouth. (*Cramer v. Hurt*, 752.)

8. **CRIMINAL LAW—EVIDENCE.—EXCLUSION ON CROSS-EXAMINATION** of questions bearing on the motive or feeling of a witness for the state against the accused is not prejudicial error, where these matters are made immaterial by the admitted conduct of the accused. (*State v. Abley*, 520.)

9. **CRIMINAL LAW — WITNESS — IMPEACHMENT — PREVIOUS CRIME.**—A witness for the prosecution in a criminal case cannot be compelled to state whether, at some previous time, he has not committed a crime. (*State v. Abley*, 520.)

10. **WITNESSES—WIFE AGAINST HUSBAND—CRIME BY HIM AGAINST HER BEFORE MARRIAGE.**—Under a statute which prohibits the examination of one spouse as a witness against

the other without his or her consent, but which prohibition does not apply to a criminal proceeding for a crime committed by one against the other, a wife is not a competent witness against her husband in a prosecution against him for a crime committed against her before they were married. (State v. Frey, 660.)

11. EVIDENCE—INTERESTED PARTY.—If a decedent has executed deeds intended as gifts, a witness who is interested in the property, and who took the deeds and delivered them to the grantees, is incompetent to testify to any directions or communications made by the deceased at the time that the witness received the deeds. (Furenes v. Elde, 545.)

12. EVIDENCE—INTERESTED PARTY.—Parties interested in the subject matter in litigation are not prohibited from testifying to facts from which inferences may be drawn, although they cannot testify directly to the facts inferred. (Furenes v. Elde, 545.)

13. WITNESSES ATTESTING—NOTICE OF CONTENTS OF WRITING.—The fact that a person signed a paper as an attesting witness does not, as matter of law, imply knowledge on his part of the contents thereof. (Lapenta v. Lettieri, 315.)

See Evidence; Wills, 6, 7.

WRIT OF SEQUESTRATION.

See Sequestration.

3851

